153 U.S. 216

PHILADELPHIA LAW ASSOCIATION

RECORD, CASE No. 14,291.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 266.

WILLIAM RUNKLE AND HARRY G. RUNKLE, ADMINISTRATORS OF DANIEL RUNKLE, DECEASED, PLAINTIFFS IN ERROR,

vs.

SANTIAGO J. BURNHAM, WHO SUES FOR THE USE OF FRANCISCO G. MEDIAVILLA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 17, 1890.

RECORD, CASE No. 14,291.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 266.

WILLIAM RUNKLE AND HARRY G. RUNKLE, ADMINISTRATORS OF DANIEL RUNKLE, DECEASED, PLAINTIFFS IN ERROR,

vs.

SANTIAGO J. BURNHAM, WHO SUES FOR THE USE OF FRANCISCO G. MEDIAVILLA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Acknowledgment of service of citation	3	2
Bond	4	2
Complaint	7	4
Notice to defendant	9	5
Plea	9	5
Similiter	9	5
Stipulation waiving jury	9	5
Statement as to trial and submission	10	5
Findings of fact	12	6
Conclusion of law	18	9
Judgment	20	9
Order allowing bill of exceptions	21	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 2, 1893.

	Original.	Print.
Bill of exceptions	22	10
Deposition of Daniel Runkle	23	11
Power of attorney from Daniel Runkle to José M. Mestre, June 25, 1884	34	16
Deposition of Lino Martinez	37	16
Emilio Cosculluela	37	18
Lino Martinez (resumed)	40	19
Translation of contract	41	19
Exhibit D[2]—Contract of Gilson, Runkle and Martinez, March 27, 1882	51	24
Motion for judgment for defendant	55	24
Deposition of Daniel Runkle	55	24
Emmit R. Olcott	55	27
Exhibit D[4]—Agreement between Daniel Runkle and Lino Martinez, November 2, 1881	56	27
D[6]—Cablegram from Mestre to Olcott, July 23, 1884	61	29
D[7]—Cablegram from Mestre to Olcott, July 18, 1884	61	30
Translation of foregoing	62	30
D[9]—Cablegram from Mestre to Olcott, July 22, 1884	62	30
D[13]—Letter from Daniel Runkle to J. M. Mestre, July 31, 1884	63	30
D[14]—Translation of contract of August 4	66	32
Deposition of Lino Martinez (recalled)	68	33
Defendant's request	69	34
Findings	69	34
Conclusions	75	37
Judge's certificate to bill of exceptions	77	37
Clerk's certificate	78	38

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of New Jersey, Greeting:

Because in the records and proceedings and also in the rendition of the judgment in a plaint which was in said circuit court, before you or some of you, between Santiago J. Burnham, a citizen of London, England, who sues for the use of Francisco G. Mediavilla and Daniel Runkle, a citizen of the State of New Jersey, a manifest error hath happened, to the great damage of the said Daniel Runkle, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and

1½ openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the third day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT,
Clerk of the Circuit Court of the United States for the District of New Jersey.

1¾ [Endorsed:] United States Supreme Court. Daniel Runkle, plaintiff in error, *vs.* Santiago J. Burnham, who sues, &c., defendant in error. Writ of error. Allowed Dec. 3, 1889. Edw. T. Green.

2 UNITED STATES OF AMERICA, *ss:*

To Santiago J. Burnham, a citizen of London, England, who sues for the use of Francisco G. Mediavilla, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, wherein Daniel Runkle, a citizen of the State of New Jersey, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward T. Green, judge of the district court of the United States for the district of New Jersey and *ex officio* a judge of said circuit court, this third day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

EDW. T. GREEN, *J.*

[Endorsed:] United States Supreme Court. Daniel Runkle, plaintiff in error, *vs.* Santiago J. Burnham, who sues, &c., defendant in error. Citation.

3 United States Supreme Court.

DANIEL RUNKLE, Plaintiff in Error,
vs.
SANTIAGO J. BURNHAM, Who Sues, &c., Defendant in Error.

Service of a certified copy of the writ of error and of a certified copy of the citation issued in the above-stated cause acknowledged for the said Santiago J. Burnham, who sues, &c., defendant in error, this fifth day of December, A. D. 1889.

BABBITT & LAWRENCE,
Att'ys for Pl'ff.

[Endorsed:] United States Supreme Court. Daniel Runkle, plaintiff in error, *vs.* Santiago J. Burnham, who sues, &c., defendant in error. Acknowledgment of service of writ of error and citation.

4 Supreme Court of the United States.

SANTIAGO J. BURNHAM, a Citizen of London, England, Who Sues for the Use of Francisco G. Mediavilla,
vs.
DANIEL RUNKLE, a Citizen of the State of New Jersey.
In Assumpsit.

Know all men by these presents that we, Daniel Runkle, of Asbury, N. J.; William Runkle, of Orange, N. J., and Henry G. Runkle, of Plainfield, N. J., all of the State of New Jersey, are held and firmly bound unto Santiago J. Burnham, a citizen of London, England, who sues for the use of Francisco G. Mediavilla, in the sum of fifty-seven thousand dollars, to be paid to the said Santiago J. Burnham, who sues as aforesaid, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this twenty-ninth day of November, eighteen hundred and eighty-nine.

Whereas the above-named Daniel Runkle hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the United States circuit court for the district of New Jersey:

Now, therefore, the condition of this obligation is such that if the above-named Daniel Runkle shall prosecute his said writ of
5 error to effect and answer all costs and damages, including "just damages for delay," if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

DAN'L RUNKLE. [L. S.]
WM. RUNKLE. [L. S.]
H. G. RUNKLE. [L. S.]

Sealed and delivered in presence of—
W. R. WILSON.

NOTE.—Words seven thousand in amount of bond written over an erasure before execution.

WALTER C. GILSON,
As to Daniel Runkle.
WM. E. ZABRISKIE,
As to Wm. & H. S. Runkle.

STATE OF NEW YORK, } ss.:
City & County of New York, }

William Runkle, of full age, being duly sworn, on his oath saith that he is a resident of and freeholder in the State of New Jersey, and that he is worth the sum of fifty thousand dollars after payment of all his debts and liabilities.

WM. RUNKLE.

Sworn & subscribed at New York city this 2d day of December, A. D. 1889.

WM. E. ZABRISKIE,
[L. S.] *Notary Public* (1), *N. Y. Co.*

6 STATE OF NEW YORK, } ss.:
City & County of New York, }

Henry G. Runkle, of full age, being duly sworn, on his oath saith that he is a resident of and freeholder in the State of New Jersey, and that he is worth the sum of fifty thousand dollars after payment of all his debts and liabilities.

H. G. RUNKLE.

Sworn & subscribed at New York city this 2d day of December, A. D. 1889.

WM. E. ZABRISKIE,
[L. S.] *Notary Public* (1), *N. Y. Co.*

(Endorsed:) United States circuit court, district of New Jersey. Daniel Runkle, plaintiff in error, *vs.* Santiago J. Burnham, who sues, &c., defendant in error. Bond. Approved Dec. 3, 1889. Edw. T. Green, J. Filed Dec. 3, 1889. S. D. Oliphant, clerk.

7 *Judgment.*

United States Circuit Court, District of New Jersey.

SANTIAGO J. BURNHAM, Who Sues for the Use of Francisco G. Mediavilla, *vs.* DANIEL RUNKLE. } In Assumpsit.

As yet of the sixth day of July, in the year of our Lord eighteen hundred and eighty-five.

LEONARD E. WALES,
District Judge.

Witness:
S. D. OLIPHANT, *Clerk.*

BABBITT & LAWRENCE,
Attorneys for Plaintiff.
WALLIS & EDWARDS,
Attorneys for Defendant.

DISTRICT OF NEW JERSEY, *ss:*

Daniel Runkle, who is a citizen of the State of New Jersey, the defendant in this suit, was summoned to answer unto Santiago J. Burnham, who is a citizen of London, England, who sues for the use of Francisco G. Mediavilla, who is a citizen of Havana, Cuba, the plaintaiff therein, of a plea of trespass on the case on promises; and thereupon the said plaintiff, by Babbitt & Lawrence, his attorneys, complains for that whereas the said defendant heretofore, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-five, at Trenton, in the district of New Jersey aforesaid, was indebted to the plaintiff in forty thousand dollars for the price and value of goods sold and delivered by
8 the plaintiff to the defendant at his request, and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at his request, and in the like sum of money for the price and value of work done and materials for the same provided by the plaintiff for the defendant at his request, and in the like sum for money lent by the plaintiff to the defendant at his request, and in the like sum of money for money received by the defendant for the use of the plaintiff, and in the like sum of money for money paid for interest due from the defendant to the plaintiff for the plaintiff's having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed, and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards (to wit), on the day and year last aforesaid, in the district aforesaid, in consideration of the premises, respectively promised to pay the said several last-mentioned moneys respectively to the plaintiff on request, yet the defendant disregarded his promises and has not

paid any of the said moneys or any part thereof, to the plaintiff's damage of forty thousand dollars, and thereupon he brings his suit, &c.

BABBITT & LAWRENCE,
Attorneys for Plaintiff.

9 *Notice to Defendant.*

Take notice that the plaintiff will claim judgment against the defendant for the sum of nineteen thousand and eighty-seven dollars and thirty-six cents, with interest thereon at the rate of nine cent. per annum from the fourth day of August, eighteen hundred and eighty-four, to the time of entering judgment, besides costs of suit, to be taxed.

Yours, &c., BABBITT & LAWRENCE.

To Daniel Runkle, the above-named defendant, or whom it may concern.

And the said defendant, by Wallis & Edwards, his attorneys, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath thereof above complained against him, and of this he puts himself upon the country, &c.

WALLIS & EDWARDS,
Att'ys of Defendant.

And the said plaintiff doth the like.

It is stipulated by and between the respective attorneys in the above cause that the same be tried before the court without
10 a jury, trial by jury being hereby expressly waived.

BABBITT & LAWRENCE,
Att'ys of Pl'ff.
WALLIS & EDWARDS,
Att'ys of Def't.

(Endorsed:) United States circuit c't, district of New Jersey. Santiago J. Burnham, who sues, &c., *vs.* Daniel Runkle. In assumpsit. Stipulation. Babbitt & Lawrence, att'ys. Filed Sep. 28, 1886. S. D. Oliphant, clerk.

Afterwards—that is to say, on the eighteenth day of December, in the year eighteen hundred and eighty-eight—in the term of September, eighteen hundred and eighty-eight, before the Honorable Leonard E. Wales, a judge of the said circuit court, at Trenton, in said circuit, came as well the within-named Santiago J. Burnham, who sues for the use of Francisco G. Mediavilla, as the within-named Daniel Runkle, by their respective attorneys within named, and produced before the said judge their respective witnesses, documents, and proofs upon the said issue; and the said court, having heard the same and the argument of counsel thereon, retains the cause for advisement until the September term, eighteen hundred and eighty-nine, of said court; and on the sixteenth day of November, in the

year eighteen hundred and eighty-nine, the following special
11 findings of facts *was* made and filed by the court as the result of the evidence offered upon the trial of said issues:

12 In U. S. Circuit Court for the District of New Jersey.

SANTIAGO J. BURNHAM, a Citizen of London, England, Who Sues for the Use of Francisco G. Mediavilla,
v.
DANIEL RUNKLE, a Citizen of the State of New Jersey.

At law. Trial by the court, a jury having been waived by the stipulation of the parties.

This action is founded on a written agreement which was entered into by the plaintiff and defendant and grew out of certain transactions connected with negotiations for the loan of a large sum of money to the city of Havana, in the Island of Cuba, and for obtaining the award of a contract to the defendant and others for the construction of water works for supplying the city with water. On an examination of the testimony and a consideration of the oral and written arguments of counsel the court finds the following facts to be proved by the evidence or legally inferable therefrom and on which judgment will be rendered:

1. On the 18th of March, 1882, contracts for a loan and water works were awarded by the city of Havana to Daniel Runkle, the defendant, Walter H. Gilson, James H. Lyles, and Maddison & Co., of London, and on the 27th of the same March Lino Martinez
13 deposited the sum of $64,000, in Spanish gold, in the municipal treasury of Havana "as a guaranty for the propositions which Messrs. Gilson, Runkle, and Lyles and Maddison & Co., of London, have presented to the municipality of Havana for the loan of $5,600,000."

2. Martinez had been employed by Runkle, who was acting for himself and his co-contractors, to raise the amount required to be deposited as a guaranty for the fulfillment of the contract, and in pursuance of this employment Martinez had borrowed the sum of $64,000 from the plaintiff, Burnham.

3. Runkle, Gilson, and Lyles undertook to repay this sum of $64,000 to Martinez at any time he should ask for the same, if it should be demanded by the city, in consequence of their not having carried out the contracts for the water works, or for any cause for which the city might retain the deposit, and, as a remuneration and for the payment of interest to Martinez, they assigned to him the amount of $25,000, payable monthly, at the rate of 1.137 per cent. from the amounts they should receive for the works. This undertaking fell through in consequence of the final abandonment of the contracts, but the fact remains that it was the understanding of all the parties that Martinez was to be repaid the sum of $64,000, with interest, and also to be remunerated for his services or expenses.

4. Subsequently to these proceedings Runkle became the
14 assignee of all the rights and interests of his co-contractors under their contract with the city of Havana, and thenceforward was solely entitled to all the profits that might accrue from its performance and liable for the consequences of its non-performance.

5. Runkle failed to perform the contract for the water works, and, by reason of his default, the sum deposited with the city of Havana as a guaranty was forfeited, and he became liable for such damages as were sustained by the city on account of his failure. He also became responsible to Martinez for the repayment of the guaranty depo-it, with interest, and the expenses incurred in effecting the loan from Burnham, amounting in all to the sum of $83,087.36, as per account stated between Burnham and Martinez on the 4th of August, 1884.

6. Runkle, being desirous to procuring a full and general release from all liability on account of his connection with the contract for the loan and water works, executed in due form, on the 25th of June, 1884, a letter of attorney to Jose M. Mestre, who was then in the city of Havana, authorizing him to demand and receive such sum or sums of money and property of any kind or right belonging to Runkle, "under or in connection with the contracts for the loan and water works, made in consequence of the public bidding therefor on the 18th of March, 1882, and which loan and contract were awarded to me (him), together with Walter H. Gilson and Maddison and Company, and also James H. Lyles," and "to do all things necessary in the judgment of my said attorney, and
15 to obtain my release from all liability as one of the contractors in connection with the said loan and water works, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present," etc.

7. By virtue of the authority conferred on him by the aforesaid letter of attorney, Mestre, on the 4th of August, 1884, acting for and in the name of Runkle, entered into a written agreement of stipulation, in the Spanish language, with Burnham, of which the following is a translation:

"This present is to certify, to which I desire to give all the force of a public instrument, that I, Mr. S. J. Burnham, having received from Mr. Lino Martinez the sum of sixty-four thousand dollars, gold, on account of the sum of $83,087.36, which results in my favor from the account that under this date has been presented to Mr. Lino Martinez in relation to the drafts drawn on the 24th of March, 1882, by Mr. H. J. Overmann upon Mr. E. C. Maddison, of London, and indorsed to my order by the said Mr. Lino Martinez, the which were protested for non-payment and protected in due course by the Messrs. Baring Brothers and Company, of London, as the representatives of the Messrs. J. C. Burnham and Company, have agreed, in

regard to the balance of $19,087.36 that still remains unpaid, as follows: Recognizing, as I recognize, Mr. Daniel Runkle as the
16 assignee of Mr. Walter H. Gilson, who in his turn was the assignee of Mr. E. C. Maddison, for himself and for the firm of Maddison and Company, I bind myself to place at the disposal of said Mr. Runkle the shares of the Charnwood Forest Railway Company, of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison and Company deposited in my hands and transferred to me as guaranty for the reimbursement of the amount of the aforesaid drafts and the expenses and interest relating thereto so soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which it is to be done within the period of three months, counting from the date hereof, it being left to his discretion either to do so directly or to direct that if the said shares deposited there be sold (in accordance with such instructions that for such purpose he may give) such portion as may be necessary for the reimbursement of such balance of $19,087.36, which being covered the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares. The sum owing shall carry interest at nine per cent. per annum until its complete payment. Mr. Jose Manuel Mestre, as the attorney-in-fact of Mr. Runkle, subscribes this present stipulation by way of assent, in the name of his principal. That in order that it may have all its due effect this is done and signed in triplicate, of the same tenor, one for each
17 party, at Havana, the 4th of August, 1884.

"*Memorandum as to Corrections.*

"Nota.—At the moment of signing Mr. S. J. Burnham stated that he assigns and transfers to Mr. Candido Zabarte y Paris all the rights and rights of action that belong to him under the foregoing instrument, subrogating him in his place and stead, by reason of having received from him the aforesaid balance of $19,087.36, but on the understanding that said Burnham remains always bounded to sell the shares of stock in question to the order of Mr. Runkle, as set forth, and to deliver to the latter the balance of the proceeds of the sale and the shares remaining. Dated as above.

(Signed) "JOSE MAN'L MESTRE.
"S. J. BURNHAM.
"L. MARTINEZ.
"CANDO ZABARTE Y PARIS.

"As witnesses:
"E. COSCULLUELA.
"ANTONIO PAIS."

S. Runkle had no property or debts belonging to or due to him in the city of Havana, and the letter of attorney was executed for the sole purpose of authorizing Mestre to procure his release from any and all liability as a contractor in connection with the water works, and there is no proof that Mestre received notice of the revo-

cation of the letter before he signed the agreement with Burnham.

18 9. Martinez exerted himself to obtain from the authorities of Havana the release of Runkle and the return of the deposit money in consideration of Runkle entering into the agreement with Burnham.

10. The right of action accruing to Burnham under the agreement was assigned by him to Candido Zabarte y Paris and by the latter to Francisco G. Mediavilla.

Conclusion.

The opinion of the court is that the agreement of August 4, 1884, was assented to by Runkle through Mestre, who had full power under the letter of attorney to bind his principal. The consideration for the agreement on the part of Runkle was his release from liability under his contract with the city of Havana, the return of the deposit money—both obtained by Martinez—and the remuneration to Martinez for interest and expenses incurred in making the loan from Burnham and for Martinez's personal services in affecting this consummation. In making the agreement of August 4th Runkle only exchanged creditors. Martinez was indebted to Burnham in the sum of $19,087.36 and Runkle was indebted to Martinez for a like amount. By the agreement Runkle assumed the payment of this sum to Burnham in the manner set out in the agreement.

Judgment will be entered for the plaintiff for $19,087.36, with interest at the rate of 9 per cent. per annum from August 4th, 1884, to the date of the entry thereof—that is, for the period of 5

19 years 3 months and 11 days, being $9,070.46, amounting, principal and interest, to the sum of $28,157.82.

November 15, 1889.

L. E. WALES, *J.*

(Endorsed:) United States circuit court, district of New Jersey. In assumpsit. Santiago J. Burnham, who sues, &c., *vs.* Daniel Runkle. Opinion. Filed Nov. 16, 1889. S. D. Oliphant, clerk.

20 And at the term aforesaid upon the day aforesaid it is, upon the said facts specially found as aforesaid by the said court, considered that the said defendant did undertake and promise in manner and form as the said plaintiff has in his said declaration alleged, and assess the damages of the said plaintiff by reason of the not performing said promises and undertakings, over and above the costs and charges by him about his suit in this behalf expended, at the sum of twenty-eight thousand one hundred and fifty-seven dollars and eighty-two cents, and for those costs and charges — cents.

Therefore it is considered that the said plaintiff do recover against the said defendant his damages aforesaid, in form aforesaid assessed, to the sum of twenty-eight thousand one hundred and fifty-seven dollars and eighty-two cents, and also fifty-one dollars and

eighty cents for his costs and charges, by the court now here adjudged to the said plaintiff and with his assent, which said damages, costs, and charges in the whole amount to twenty-eight thousand two hundred and nine dollars and sixty-two cents, and the said defendant in mercy.

Judgment signed this twenty-first day of November, 1889.

L. E. WALES, *Judge*.

21 United States Circuit Court, District of New Jersey.

SANTIAGO J. BURNHAM, Who Sues for the Use of Francisco G. Mediavilla,
vs.
DANIEL RUNKLE.

Order.

This action having come on for trial on the eighteenth day of December, A. D. eighteen hundred and eighty-eight, and the court having given judgment, and judgment therein having *seeb* entered on the twenty-first day of November, eighteen hundred and eighty-nine, and the defendant having taken exceptions to the rulings of the court on the hearing of said trial of said action, which exceptions were then and there allowed by the court—

It is, on this twenty-third day of September, A. D. 1890, ordered that the bill of exceptions herein signed on the sixteenth day of September, instant, be allowed and filed as of the term at which said action was tried and determined.

LEONARD E. WALES, *J.*

(Endorsed:) United States circuit c't, district of N. J. Santiago J. Burnham, who sues, &c., *vs.* Daniel Runkle. Order. Filed September 24, 1890.

22 *Bill of Exceptions. Filed December* 18, 1888.

United States Circuit Court, District of New Jersey.

SANTIAGO J. BURNHAM, Who Sues for the Use of Francisco G. Mediavilla,
vs.
DANIEL RUNKLE.

This action came on to be tried on the eighteenth day of December, eighteen hundred and eighty-eight, before Mr. Justice Wales, district judge for the district of Delaware, sitting as circuit judge, a jury having been waived, at the United States court-rooms, in the city of Trenton, New Jersey.

The plaintiff appeared by Mr. Robert L. Lawrence, his attorney, and the defendant by Mr. Hamilton Wallis, his attorney.

Mr. Lawrence read, in behalf of the plaintiff, the deposition of Daniel Runkle, the defendant, taken before trial at the instance of plaintiff.

23 DANIEL RUNKLE, the defendant, being examined before trial at the instance of the plaintiff, being duly sworn, testified as follows:

I am the defendant in this case and reside at Asbury Park, New Jersey. About the year 1882 I was interested in the erection of water works in the city of Havana. There were associated with me in the contract Mr. Gilson, Mr. Lyles, and Mr. Martinez. Mr. Gilson resided in Jersey City, Mr. Lyles in Long island, and Martinez, I think, in Havana, Cuba. Mr. Martinez put up the security for the contract. He had his interest in that way. Of my own knowledge I do not know that the $64,000 of security was deposited. The contract for the erection of the water works was not carried out. I understood that the contract was finally rescinded. My attorneys in New York at this time were Olcott & Mestre. That is the firm name now. I did not have a legal representative in Havana. Mr. Mestre, Mr. Olcott's partner, was our representative there. He represented me throughout all these dealings in Havana, including the resci-ion of the contract. When the contract was rescinded the $64,000 guarantee was returned to the parties who gave it; I presume Mr. Martinez. I do not know whether Martinez furnished all with his own money or whether he raised it through others. I do not know Mr. S. J. Burnham personally, but know who he is, and presume that he lives in Havana. I had heard of him before being connected with this suit—when we tried to negotiate the bonds. The carrying out of this contract depended upon the successful negotiation of certain bonds; and I had heard
24 of him through Mr. Lyles or some of them in that connection. I first heard of him in regard to the $64,000. I do not know whether advances of money were made on account of this contract or in connection with it. I know of no money advanced except the $64,000 guarantee. That was not the only money expended. I had to expend money in negotiating the bonds. I have heard of the firm of Maddison & Company as connected with the negotiation of these bonds; they proposed to negotiate them; they were of London. Some effort- were made to negotiate these bonds through Maddison & Company. I do not know whether or no any expenditures were made in that connection. I do not know whether the $64,000 guarantee when returned by the city authorities was returned by Martinez.

Q. If not returned to Mr. Martinez, you, I understand, are responsible to him for that amount?

(Objected — as assuming something that is not proved, and, the matter having been reduced to writing, the writing must be produced.)

(Objection overruled. Exception by defendant.)

A. Of course the money would have to be given to Mr. Martinez as the party giving the money and to the parties making the contract.

Q. And you became assignee to the parties making the contract, did you not?

(Objected to, as the assignment was in writing.)
25 (Objection overruled. Exception by defendant.)

A. I think that was the fact, sir.

Q. And you are assignee of their interest, not only in the contract for the erection of the water works, but also for the negotiation of the bonds?

(Same objection. Objection overruled. Exception by defendant.)

A. No, I think not; the arrangement for the negotiation for the bonds was taken in connection with the contract for the water works; the same persons were interested in each and I became assignee of the parties; after the $64,000 was returned by the authorities of Havana, I paid the bills for lawyers' fees, traveling expenses, the engineer, &c., Messrs. Lyles and Gilson having failed; these payments were made to persons in this country; no bills were paid to any persons in Havana except to Mr. Mestre, and they were for legal services; he was my attorney in Havana.

Q. And was he authorized to act for you generally in relation to these contracts in Havana?

(Objected to, as his authority was in writing.)
(Objection overruled. Exception by defendant.)

A. All the legal matters that I had to be attended to there were done by him; he was authorized, as my attorney, to attend to my interests.

Q. Do you know of any settlement that was made after the rescis-sion of the contract for the erection of the water works between Mr. Mestre, acting for you, and Mr. Burnham?

26 A. I received word from Mr. Mestre that the money had been returned, the deposit given up, and all was settled; that is the extent of the information that I received from Mr. Mestre so far as I recollect. In connection with this matter I also heard of certain shares of the Charnwood Forest Railroad Company. I could not tell you what relation those shares bore to any other matters connected with this contracts. I heard about them from Mr. Gilson. I did not hear anything from Mr. Mestre in regard to them. My understanding obtained through Mr. Gilson was that they took them to secure themselves, but for what I do not know. I did hear that Mr. Burnham had some connection with them through Mr. Olcott. I first heard of this after the moneys had been returned to the parties depositing them. I did not learn that a settlement had been effected with Mr. Burnham.

Q. Have you ever heard to this day that any settlement was effected with Mr. Burnham?

A. My knowledge of Mr. Burnham was through Mr. Olcott. At the time when the contract was rescinded there was no money due to me in relation to it by persons in Havana.

Q. At that time, unless Mr. Martinez had got back his $64,000, were you responsible to him for that?

(Objected to as argumentative, as incompetent, and as calling for secondary evidence.)

(Objection overruled. Exception by defendant.)

27 A. I was bound to make returns to the parties making the contract.

Q. Any other sums of money, if there were any paid or advanced, on account of the parties whom he has engaged in these contracts, you were also bound to reimburse, were you not?

A. No, sir.

Q. Were you not bound to repay any indebtedness incurred on account of these contracts by the parties whom you represented as assignee? -

(Objected to as calling for a conclusion and the construction of a written instrument.)

(Objection overruled. Exception by defendant.)

A. Any just debt I had to pay. I do not know that Mr. Mestre was in Havana while the negotiations in regard to these contracts were being carried on. I suppose he kept me informed in regard to them; his letters were directed to his firm in New York, from whom I received all my information. All the knowledge that I obtained of Mestre's transactions of my business came through Mr. Olcott, his partner, but I also learned in regard to it from Gilson. The information in regard to Mr. Burnham I obtained through Olcott; came to me in the same way as all other information that I had obtained.

Q. I now ask the witness to state what he heard from Mr. Olcott in relation to Mr. Burnham's connection with this contract.

28 Objected to as calling for a communication between lawyer and client.

(Objection overruled. Exception by defendant.)

A. I understood Mr. Olcott to say that Mr. Burnham had called on him and asked me, through him, to take up thise railroad stock that he held; to take it up and pay him money for it, which I objected to do. I think this is the first time that I knew Mr. Burnham had anything to do with it.

Q. Was it communicated to you at Mr. Burnham's request that you should take up these securities?

(Same objection. Objection overruled. Exception by defendant.)

A. That he had taken the stock, and that I had the privilege of redeeming it if I wished to, and which I did not wish to do.

Q. Was it communicated to you what he had taken the stock for?

(Same objection. Objection overruled. Exception by defendant.)

A. It was, but I just don't recollect now what it was.

Q. Was it that he had taken it in a settlement that was effected after the contract had been rescinded?

(Same objection. Objection overruled. Exception by defendant.)

A. No; I think not. I understood that he had taken it as a guarantee for himself for money loaned.

Q. Did you understand to whom money was loaned or for whose benefit?

(Same objection. Objection overruled. Exception by defendant.)

A. Mr. Martinez, as I understood it.

Q. And in what connection with these contracts?

(Same objection. Objection overruled. Exception by defendant.)

A. The $54,000. He loaned Mr. Martinez the $64,000 and he put it up as collateral. In that way he got this railroad stock. I did not learn and have never heard whether any more had been advanced than this $54,000. I do not recollect that certain drafts had been cashed and taken up by Mr. Burnham.

Q. Do you know whether a settlement in writing, in relation to the money advanced by Mr. Burnham, was effected after the rescis-ion of the contract?

A. I don't know of anything about Mr. Burnham in regard to the contracts of my own knowledge. I heard that he had loaned the money and taken this stock as collateral in some shape, I don't know what. I did not learn that a settlement had been effected with him in regard to it. I do not know anything about it of my own knowledge. Mr. Martinez was the man that I knew of in regard to the contract.

Q. Did you learn that any settlement or agreement was come to in regard to these matters between Martinez and Mestre?

A. I learned from Mestre that the money was returned by the city and the matter was settled; that was all of the information that I got from Mestre that I recollect; I never received any information that Mestre for me had made a settlement with Mr. Martinez and Mr. Burnham by which I was found to be indebted to Mr. Burnham.

Q. Then in the communication received from Mr. Mestre through the firm of Olcott & Mestre in New York nothing ever came to your knowledge in regard to a settlement made by him for you with Mr. Martinez and Mr. Burnham? Is that true?

A. The word that came to me was the matter was settled, as the money came from the city. That word came to me when the thing was closed. I do not recollect the day, but think it was in 1884. I have no recollection of ever having seen either the original or a copy of the paper dated August 4, 1884, signed by S. J. Burnham, José Manuel Mestre, Cardido Zabarte y Paris, and L. Martinez. I first heard of it probably in November or December, 1885. I cannot tell you when I first learned that there had been a written settlement. It was less than three months after this date, August 2, 1884. I am sure of that. I do not know that I requested to see the

writing. I do not know that I knew that there was a writing signed by Mr. Mestre on my part with these other parties. All that I know was that the matter was reported settled by Mr. Mestre. I did not bother myself after that. The matter had been settled. There was nothing to leave to Mr. Mestre. He reported the matter all settled. I did not inquire into the details of the settlement,
31 although I knew that there was a settlement in writing. I do not recollect definitely that I heard of this written settlement within three months, but may have done so. I do not know that I asked to see the writing. I did not know that Mr. Mestre had on my part made a written settlement, nor did I know that I learned this within three months afterwards. I only suppose that I did. I did not know that Mr. Mestre had on my part signed a written settlement. I do know that he reported that the matter was all settled and the money returned. I have not stated that I knew that it had been done in writing. I said I supposed I learned that fact within three months after it was done. I do not know that I have ever seen that paper until to-day. I did not know if the settlement was in writing; that it had been signed by Mestre on my part, nor did I suppose anything. He reported the whole matter settled, and I rested there. I did not make any further inquiry about it. Mr. Mestre was not there especially to make a settlement on my part.

Q. Had you anybody else acting for you?

A. I suppose he requested the money returned.

Q. All that was done for you down there was done by Mr. Mestre at that time?

A. He was there as my attorney. I had no one especially taking charge of my business affairs aside from the legal aspect. I may have had some other person there at that time, but it was in regard to another matter outside of the water works. I had no one else there in this connection, and I was not there personally during this time.

32 Cross-examination:

Q. You have stated that you understood that there was an agreement entered into in the matter concerning which you have testified by which one Martinez was to get certain securities. Was this arrangement, if there was any such, in writing?

A. Not to my knowledge. I never had any personal knowledge about it. I have never seen an agreement or copy of agreement in writing in relation to furnishing securities by Martinez. I do not know whether the arrangement by which I became assignee of certain parties was in writing. I do not recollect. I do not know as a matter of fact that I ever did become assignee for any of these parties. I never saw a written assignment to myself of their interest in these contracts and never knew of the existence of one. Messrs. Olcott and Mestre, of New York, were my attorneys-in-law in all this transaction. I have no personal knowledge that the deposit of $64,000 was returned to the parties who made it; all that I

learned was through others. I never had any personal knowledge on the subject. I never had any personal knowledge that Maddison & Company made efforts to negotiate the bonds of the city of Havana which I have spoken of or what those efforts were. I never learned of the existence of the paper dated August 4, 1884, and purporting to be signed by S. J. Burnham, José Manuel Mestre, Candido Zabarte y Paris, and L. Martinez, before the commencement of this action.

33 Q. You have testified that you supposed you must have heard that a certain settlement was made in writing within three months after the settlement was made. What settlement did you refer to?

A. With the city of Havana, whereby the $64,000 was returned to the depositors.

Q. And that is the only settlement that you referred to?

A. Yes, sir.

34 Mr. Lawrence offered in evidence on the part of the plaintiff power of attorney made by Daniel Runkle to José M. Mestre, dated June 25, 1884.

The defendants' counsel objected to the instrument—

First, that it was not a complete instrument, in that it referred to an instrument in writing as annexed and made part of the power of attorney, which instrument was not annexed.

Second, because it was not included in the bill of particulars of the plaintiff's claim furnished to the defendant.

(Objection overruled. Exception by the defendant.)

Know all men by these presents that I, Daniel Runkle, of Asbury, in the State of New Jersey, individually and in my own name and as the assignee and transferee of Walter H. Gilson, individually and in his own name and as the transferee of the firm of Maddison and Company, of London, England, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, José M. Mestre, of the city of Havana, Island of Cuba, my true and lawful attorney, for me and in my name, place, and stead, to ask, demand, collect, and receive such sum or sums of money and property of all or any kinds to which I, in any capacity aforesaid, have or may have the right or claim or demand under or in connection with the contracts for the loan and water works made in consequence of the public bidding therefor at the city of Havana, in the Island of Cuba, on the 18th day of March, 1882, and which

35 loan and contract were awarded to me together with the said Walter H. Gilson and Maddison and Company and also James H. Lyles, or by virtue of a certain deed of transfer or assignment made and executed by the said Walter H. Gilson on the — day of June, 1884, a copy whereof is hereunto annexed and made a part of this instrument.

In case of non-payment of any such sum to take all such proceedings in court or without as to my said attorney shall seem best; to sue and discontinue all such proceedings and suits brought at any stage whatever; to compound and compromise all such claims as I

may have aforesaid for such terms and in such manner as to my said attorney shall seem best for my interests; for all such sums of money and property received to give such receipts, acquittances, and releases, whether unsealed or otherwise, as to my said attorney shall seem best; to sign, seal, execute, and acknowledge and deliver all instruments in writing, whether under or not under seal; to elect domicil; to appoint such proctors, attorneys-at-law, barristers, and agents as to my said attorney shall seem best; to issue and confer in proper form in writing such powers of attorney (with power of substitution); to carry into execution all such part of the powers herein conferred as may seem necessary and as my said attorney shall deem advisable, and to substitute this power in whole or in part; to do all things necessary in the judgment of my said attorney, and to obtain my release from all liability as one of the
36 contractors in connection with the said loan and water works, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof *we* have hereunto set my hand and seal the twenty-fifth day of June, in the year one thousand eight hundred and eighty-four.

DAN'L RUNKLE. [L. S.]

Signed, sealed, and delivered in the presence of—
ANTONIO C. GONZALEZ.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it known that on the 25th day of June, 1884, before me, the undersigned notary public, personally came and appeared Daniel Runkle, to me personally known and known to me to be the same person described in and who executed the within power of attorney, and who acknowledged the within power of attorney to be his act and deed for the purposes therein mentioned.

37 In testimony whereof I have hereunto subscribed my name and affixed my seal of office the day and year last above written.

ANTONIO C. GONZALEZ.
[L. S.] *Notary Public, New York.*

LINO MARTINEZ, a witness produced on the part of the plaintiff, being duly sworn, testifies as follows:

Q. I show witness a contract in the Spanish language, bearing date August 2, 1884, and I ask the witness if he knows the persons who have signed this contract as subscribing witnesses, Antonio Pais and E. Corcuilluela; you know those persons?

A Yes, sir; they live in Cuba. I saw them sign this document. I was there present. They are in Cuba. I am not one of the contracting parties to this instrument. I was only a witness there. I signed it as a witness and saw it signed by all those parties.

The examination of the witness was here suspended, and counsel for the plaintiff read the deposition of E. COSCULLUELA, taken under commission, as follows:

38 U. S. CONSULAR AGENCY, NUEVITAS, *July 21st*, 1888.

First interrogatory. What is your name, age, and occupation and where do you reside?

Answer to first interrogatory. Emilio Cosculluela; thirty-seven years; merchant; resides at Pto. Principe.

Second interrogatory. Did you sign your name as one of the subscribing witnesses to the instrument in writing which is annexed to this commission and which is now shown you?

Answer to second interrogatory. I did sign as above mentioned.

Third interrogatory. Were you present at the execution of said instrument in writing?

—. I was present.

Fourth interrogatory. Did you see the persons whose names purport to be signed to said instrument in writing as makers thereof sign there names thereto?

Answer to fourth interrogatory. I did see the person whose name is signed to said instrument in writing as maker thereof.

Fifth interrogatory. Do you know Antonio Pais, the person whose name purports to be signed to said instrument in writing as one of the subscribing witnesses thereto?

39 Answer to fifty interrogatory. I do know Antonio Pais.

Sixth interrogatory. State where said Antonio Pais now resides, if you know.

Answer to sixth interrogatory. I do not know.

Seventh interrogatory. Did you see Antonio Pais sign his name to said instrument in writing as one of the subscribing witnesses thereto?

Answer to seventh interrogatory. I did see said Antonio Pais sign his name to said instrument in writing as one of the subscribing witnesses thereto.

E. COSCULLUELA.

JOAQ'N SANCHES ADAM, [L. S.]
Consular Ag't of U. S.

40 Plaintiff's counsel offers the contract in evidence.

(Objected to—

First. That the witness Martinez, being a party to the instrument in question, cannot be called to prove its execution.

Second. That the testimony of a subscribing witness having been taken, it only can be read to prove the execution of the instrument.

Third. That the execution of the instrument has not been properly proven.)

(Objection overruled. Exception by defendant.)

Contract received in evidence. (The contract being in the Spanish language, the translation is found below.)

LINO MARTINEZ' testimony resumed:

I am a Spaniard—a Cuban. I am well acquainted with the Spanish language; have spoken it all my life. I am a native of Havana. Spanish is my native tongue. I have resided in this country several times from one to two years. I consider myself as familiar with the English language as a foreigner can be. I am not a master of the language, but I think I can translate this (referring to the contract in question).

Q. Now, will you translate into English that document?

A. That is very difficult. I will do the best I can. Here it is stated that with all the power of a public document—you want it translated word for word?

Q. Turn it into English.

41 A. It is stated, with all the power of a public instrument, that I, S. J. Burnham, have received from Mr. L. Lino Martinez the amount of $64,000 in gold on account of the $83,085.36 that results to my favor on account; that this date I have presented to the said Lino Martinez, with reference to the draft drawn in 24th March, 1882, by Mr. H. J. Overman to the account of C. E. Maddison, of London, and endorsed to me by said Lino Martinez, the said draft having been protested for failure of payment, in due time paid by Baring Brothers, of London, in representations of Messrs. J. S. Burnham & Co. I here have agreed in regard to the balance of $19,085.36 that is owing, or rather pending of payment yet, as follows: Recognizing, as I recognize, that Mr. Daniel Runkle, assignee of Mr. Walter Gilson, who at his time was assignee of Mr. C. T. Maddison by himself, by the name of Maddison & Co., I pledge myself to put at the disposal of the said Runkle the shares of the company of the Charnwood Forest Railway Company of the nominal value of 14,000 pounds sterling that this Maddison & Co. above mentioned had deposited in my power, and have been transferred to me as guarantee; and the payment of the amount of the above-mentioned pounds of sterling and of the expenses and interest corresponding as soon as the said balance will be paid to me of $19,087.36 by the above-mentioned Mr. Runkle—which ought to be done in three months time, beginning from this date, and will be at his discretion—to do this directly or well to dispose that the said shares deposited should be sold according to the instrument,

42 that he will give him the amount that it should be necessary for the repayment of the said balance of $19,085.36, and when this will be covered the shares will remain to the entire disposition of Mr. Runkle, just the same as any amount in gold that may result from the partial sale of the said shares. The amount owed will have an interest of 9% by the year until the complete payment. Mr. José Manuel Mestre, as an attorney in-fact of Mr. Daniel Runkle, subscribes the present agreement, as *prove* of his conformity, in the

name of his constituency, and will have all the due effect. We make and sign three exactly the same, one for each party, in the city of Havana, 4th August, 1884. (Corrected.—S. J. Residue.)

Postscript.—In the moment of signing this agreement Mr. S. J. Burnham states that he transfers to Mr. Condido Zabaret y Paris all the rights and actions that correspond to him according to the preceding agreement, subrogating in his place and right, in consideration that the above-mentioned balance of $19,089.36 has been paid to him; but it is understood that Mr. Burnham is always pledged to sell the shares above mentioned to the order of Mr. Runkle as aforesaid, and to deliver to the latter the remaining of the product of the sale and the remaining shares. Date above mentioned.

(Signed) S. J. BURNHAM.
JOSÉ MANUEL MESTRE.
CANDIDO ZABARET Y PARIS.
L. MARTINEZ.

As witness:
E. CORCUELUELS.
ANTONIA PEREZ.

43 Defendant moves that this instrument be stricken from the record, on the ground that it is not shown to be the contract of the defendant.

(Motion denied; exception by defendant.)

Contract of August 4th withdrawn by plaintiff.

I reside in Havana. I am very well acquainted with the defendant in this suit, Mr. Runkle; also with Jose Manuel Mestre. I remember the occasion of a contract for the erection of water works in the city of Havana, in which Mr. Runkle became interested. I raised some money to be deposited as guarantee on account of that contract, from Mr. Burnham for Mr. Runkle and his other parties. I knew Mr. Burnham very well.

Q. In what way did you raise that money?

A. I have to explain thoroughly.

Q. Go on in your own way.

A. When I went, here in New York, to the office of Mr. Olcott, where I met Mr. Runkle, in November or December, 1881, he prayed me to go to Havana and try to get for him the contract for the loan and water works of the city of Havana. He authorized me to obtain a contract for him and other parties—Mr. Gilson, Mr. Martinez, and Mr. Lyles. Previous to that it was necessary to obtain a deposit of $64,000. They have not money to make the previous deposit so that the contract will be conferred to them. This Mr. Gilson, who was acting in Havana and who signed all the documents, acted for Mr. Runkle. He accepted the whole thing and he
44 came and said that a depesit of $64,000 was to be made and the money was not there; then I was asked by Mr. Gilson. I had a written contract afterwards.

Q. Do you refer to the one you have just examined?

A. Yes, sir.

To the COURT: Proposals were issued by the government of Havana for the organization of certain water works. Mr. Runkle, with some others, was trying to get that contract. He was not going to take it alone; four other parties were to take it with him. It was necessary that they should make a deposit of $64,000. Mr. Runkle has not the money. He employed me to raise it and I raised it from Mr. Burnham. I understood it was this way: Mr. Overman, one party representing Mr. Maddison, as there were four gentlemen contracting in this business—Mr. Runkle, Gilson, Lyles, and Maddison, of London. In Havana Mr. Gilson was acting for Mr. Runkle—I understood that—and Mr. Overman was acting for Mr. Maddison. When the moment arrived to make the deposit Mr. Overman wanted to sell some drafts against Maddison, of London, and then I had to get the money from Mr. Burnham and make a deposit and obtain the contract. I myself became responsible to Burnham for $64,000 and I deposited it as a guarantee.

(By PLAINTIFF'S COUNSEL:)

Q. Now, then, just explain how this sum of $83,000 in the contract was made up.

By the COURT: We have got to show, of course, why Mr.
45 Martinez had this money of Mr. Burnham's. He was acting in the interest of Mr. Runkle in taking that money. Mr. Runkle, of course, became responsible to you.

A. Yes, sir.

Q. Now we want to see how Mr. Runkle became responsible.

A. I was responsible to Mr. Burnham for that amount.

Q. How did Mr. Runkle become responsible to Mr. Burnham?

A. Mr. Runkle became responsible to Mr. Burnham by that last contract that was read here, the contract that I translated; it all depends on that.

(By PLAINTIFF'S COUNSEL:)

Q. How is that $19,000 made up?

A. It is a long history to tell that. The representative of Mr. Maddison who was in Havana at the time of the contract proposed—I will only state the history. The drafts on London where I raised the money were guaranteed by me, and when I arrived in London the *contracts* (drafts) were not paid; the drafts were protested, and they raised money, and they had several expenses, and that money is represented in this $19,000; this $19,000 is represented by protest and interest incurred by the said drafts. There was an account made up of that between me and Mr. Burnham. (Witness shown a paper.) This is a copy of that account; it was made up between me and Mr. Burnham in Spanish, I think. (Witness shown another paper.) This is the original account between me and Mr. Burnham. The balance due there is $19,087.36, which was the amount agreed between me and Mr. Burnham.

46 Q. Will you read the account to the court?

(Objected to on the ground that it is not evidence against the defendant. Objection overruled. Exception by defendant.)

Witness reads the account as follows:

Mr. Lino Martinez to S. C. Burnham & Co., Dr.

Costs, disbursements, and interest of the —, drawn at Havana the 24th of March, '82, by H. J. Overmann on E. C. Maddison, of London, endorsed to our order by M. Lino Martinez, which drafts were not paid on presentation in London, having been protested and protected in due course by the Messrs. Baring Bros. & Co., of said place, as our representatives—that is to say:

Draft on London, £6,000, at 19¼ % P. 1.....				$31,768 20
Telegram to London.....		13 20		
Stamps		10		
Brokerage returned on part of £13,000.....		53 37		
				76 57
Draft, £7,000, at 20 % P.....				37,296

Costs of protest at London as follows:

Protest.....	£23	0 6		
Telegrams.....	4	5 9		
Stamps.....	1	13 9		
		£29	$128 76	
At 19½ % P.....			25 11	
				153 87
47 Brokerage returned for remainder of £13,000....				116 18
Stamps for the — for £13,000.....				30 00
May 28, 1882.....				69,440 82
Interest for 797 days to date, at 9 %, $69,440.82.....				13,646 54
Lino Martinez owes.....				83,087 36
Of which deduct the deposit if it be collected.....				64,000 00
M. Lino Martinez will owe.....				19,087 36

For which sum is guaranteed, besides the personal guarantee, 1,400 shares of Charnwood Forest Railway Co.'s stock, which shares are in the hands of our M. Santiago J. Burnham.

Havana, 4 Aug., 1884.

E. & O. E.

S. C. BURNHAM & CO.

This contract for the erection of the water works was not carried out.

There was an effort to obtain Mr. Runkle's release from the "64,000 forfeiture;" that was done by me at the request of Mr. Mestre.

(To the COURT:) I knew that Mr. Mestre was acting as the representative of Mr. Runkle.

Q. How did you know it?

A. Mr. Mestre told me every step that he moved that he was consulting with New York in everything.

Q. The question is, did you impose any condition upon giving your services to secure the recision of that contract? What
48 did you require to be done on the part of Mr. Mestre for Mr. Runkle in connection with this $19,000? What did you require that Mr. Mestre should do in order to get your influence with the city authorities?

(Objected to as incompetent. Objection overruled. Exception by defendant.)

A. Only to settle with Mr. Burnham. That is all I asked, and I asked for several months for that to settle that $19,000 with Mr. Burnham. That was the only thing. I insisted that Mestre should do that. It was a condition, I told him.

Q. This contract that has been referred to—do you know what Mr. Mestre did with it before it was signed?

A. Yes, sir.

(By DEFENDANT'S COUNSEL:)

Q. How do you know?

A. I was attending to every step at every moment.

Q. You saw what he did with it?

A. I tell you how—when we agreed to relieve Mr. Runkle of all responsibility——

Q. What responsibility do you mean?

A. Of course, of the municipality, as all claims against the contractor.

Q. For damages for non-performance?

A. Certainly, and to keep the deposit and go against the contractor. When we agreed on a basis to settle this matter with Mr. Burnham and to devote all my time and attention to relieving that contractor to annul the contract, we went together to Mr.
49 Mestre, myself and Mr. Burnham, and we made a project of agreement, and then Mr. Mestre said, I don't want to do anything unless I consult with the parties in New York. Give me sufficient time to consult these New York parties—Mr. Olcott and Mr. Runkle.

Q. What did he send to New York?

A. The draft of the agreement. Then he sent that to New York. I went several times to Mr. Mestre and asked him, Have you any reply from New York? He said, No; but I expect it every moment. A few days afterwards he had a letter in his hands and said, Here is the reply from New York. We can go there and sign the agreement now. Then Mr. Mestre and I went to Mr. Burnham and signed the agreement—that is, the agreement I have been shown and translated here. The agreement with the municipality was rescinded in the most ample way and Mr. Runkle was released from all responsibility for that to the city of Havana. I obtained the $64,000 guarantee from the city, which amount was given to Mr. Burnham.

Q. If you had not obtained that would Mr. Runkle have been responsible to you for it?

(Objected to as incompetent. Objection overruled. Exception by defendant.)

A. He would have been responsible.

Cross-examination:

I am myself responsible to Mr. Burnham in case Mr. Runkle does not pay this $19,000 and interest. This Mr. Mestre that I have testified about is dead.

50 Q. Did Mr. Mestre ever show you any powers of attorney from Mr. Runkle, written documents?

A. You have it there.

Q. Did he show you any others?

A. I don't remember.

Q. Didn't he show you one in the Spanish language?

A. I don't remember whether he did or not.

Q. Did not Mr. Mestre have several papers there?

A. I think so. I do not remember that point. I never went into his papers. I either wrote or telegraphed to New York to have further orders or different powers sent from Mr. Runkle. At the last minute I think a power of attorney was sent to Mr. Mestre and myself for the final act of signing. It was in Spanish, I think. I cannot swear that, but I think it was, or it was translated there. I don't remember. I met Mr. Runkle in 1881, in Mr. Olcott's office. After I came back from Havana, after they had obtained the contract, I saw him in April or May, 1882, two or three times. I do not recollect that I ever saw him again. (Shown a paper.) I think that is a translation of the contract entered into between me and Mr. Runkle and these other parties in relation to this account that I have spoken of; that was executed in Havana. (Marked Exhibit D 10, in evidence.)

51 D 10.

Be it known by these presents, which shall have all the force of a public document, that we, whose signatures are below attached, viz:

Lino Martinez, of Havana, party of the first part, and Walter H. Gilson, of New York, party of the second part, for himself and as representative of Daniel Runkle, of Asbury, New Jersey, and James H. Lyles, of New York, which power of attorney was dated 3rd of January, 1882, and deposited in the offices of the potaria public, Carlos Amores y Sanz, have agreed conjointly to the following:

1. Lino Martinez deposits of his capital in the treasury of the municipality of Havana the sum of $64,000 in Spanish gold as a guarantee for the propositions which Messrs. Gilson, Runkle, and Lyles and Maddison and Co., of London, have presented to the municipality of Havana for the loan of $5,600,000.

2. Messrs. Gilson, Runkle, and Lyles undertake to deliver the

above-named sum to Mr. Martinez at any time he may ask for the same if it should be demanded by the municipality in consequence of their not having carried out the contracts for the water works or for any cause that the municipality might retain said deposit.

3. Messrs. Gilson, Runkle and Lyles, as a remuneration and for the payment of interest to Mr. Martinez for the said deposit, assigned to him from now the amount of $25,000 in Spanish gold, which Mr. Martinez is to receive monthly at the rate of $1\frac{137}{1000}$ p'r c't from the amounts as they are paid for the works.

52 This is without prejudice to any other agreement entered into between the above named.

The witness whereof we set our hand and seal to this, to be made a notarial document at any time it should become necessary, signed in duplicate before witnesses this 27th day of March, 1882.

W. H. GILSON.
JAMES H. LYLES,
pp. W. H. GILSON.
DANIEL RUNKLE,
pp. W. H. GILSON.
LINO MARTINEZ.

Witnesses:
J. D. STABLE.
H. J. OVERMANN.
VANENTINE E. FRAU.

53 Q. What do you know about these several expenses which you say made up this item of $19,000? Do you know anything further than that they were presented to you by Mr. Burnham?

A. That is all that I know.

Q. Do you know whether that account that is set forth came to the notice of Mr. Runkle personally; did you ever see Mr. Runkle have it?

A. Oh, no; I never did; I can't know that.

Q. You say, Mr. Martinez, that before the execution of this paper that has been read and which you translated you had a conversation and talk with Mr. Mestre in relation to this $19,000, and that you then made it a condition of your getting this $64,000 that Mr. Mestre should obligate Mr. Runkle to assume that $19,000 of indebtedness; that was an agreement then made between you and Mr. Mestre?

A. That was a verbal agreement; Mr. Olcott was present at this meeting with Mr. Runkle in his office in the fall of 1881.

Mr. Olcott is familiar with the Spanish language and competent to translate it into English; he is an authority for that; I think he can translate.

(Redirect:)

I show the witness a writing which is annexed to the contract that I offered in evidence, a writing in the Spanish language, and

ask him whether he knows the signature of Antonia Pares, the subscribing witness.

54 A. Yes, sir; I saw him write and sign it; he is a resident of Cuba; he is in Cuba now.

Q. Will you translate that instrument?

A. I transfer to Mr. Francisco G. Mediavilla all the rights and actions that correspond to me according to this document, subrogating him in my place and grade in consideration of having received of the said gentlemen the aforesaid balance of $19,087.36 in gold, but on the condition that Mr. Santiago J. Burnham is always pledged to sell the shares on reference on the order of Mr. Runkle, as has been stated, and deliver to the latter the remainder of the product of the sale of the said shares.

Havana, March 20th, 1885.

Signed by—

G. B. GOMEZ COND. ZABARET Y PARES.

As witnesses:

FREDERICO MAJAE.

ANTONIO PAIS.

(By PLAINTIFF'S COUNSEL:) I offer the contract of August 4, 1884, and the assignment in evidence.

(The contract is objected to on the ground that it is not shown to be the contract of the defendant. Objection overruled. Exception by defendant.)

The assignment is objected to on the ground that it is not included in the plaintiff's bill of particulars.

(Objection overruled. Exception by defendant.)

(The contract and assignment have been already spread upon the record.)

Plaintiff rests.

55 Defendant moves for judgment on the plaintiff's case:

First. That the contract of August 4, 1884, was not shown to be the contract of the defendant.

Second. That said contract imposed no liability upon the defendant.

Third. That if the $19,000 sued for is for interest accruing or accrued upon the deposit of $64,000 that has been provided for by the agreement between the parties, which agreement was accepted by Burnham in full satisfaction of all claims for interest.

Fourth. That no authority has been shown to Mestre to bind the defendant by the agreement of August 4th, 1884.

(Motion denied. Exception by defendant.)

DANIEL RUNKLE, a witness produced and sworn on the part of the defendant, testifies as follows: I reside at Asbury Park, New Jersey. I am the defendant in this action. I never saw Exhibit B 1 nor anything like it. No such account has ever been handed me.

EMMIT R. OLCOTT, a witness produced, sworn, and examined on the part of the defendant, testified as follows: I reside in New York city and am a lawyer. I know Mr. Burnham, Mr. Runkle, and Mr. Martinez. (Shown a paper bearing date November 2, 1881.) The signature under the witness clause in that paper is my signature. I saw the parties named in this paper execute it and signed my name at the same time as a subscribing witness.

(Paper offered in evidence and marked Exhibit D 11.)

56 EXHIBIT "D" 11.

Articles of agreement made this second day of November in the year 1881 by and between Daniel Runkle of Asbury, county of Warren, State of New Jersey party of the first part and Lino Martinez of the city of Havana, Island of Cuba part of the second part witnesseth:

That whereas the city of Havana in the Island of Cuba is desirous of constructing or having constructed certain water works in accordance with certain specifications prepared by it for the purpose of supplying the inhabitants of said city with water, and

Whereas it is supposed that said city will issue for that and other purposes connected therewith its bonds to the amount and of the face value of about six millions, five hundred thousand dollars, and

Whereas the sum of two million, two hundred thousand dollars in the lawful money of the United States is to be paid by said city out of the sum realized by it from the sale of said bonds to the person or persons to whom the contract for the construction of said water works may be awarded.

Now therefore, the party of the first part for and in consideration of the premises and of the sum of one dollar to him in hand paid by the party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged and of other good and valuable consideration, does hereby covenant, promise and agree to and with the party of the second part.

57 First. That if said contract for the erection and construction of said water works is awarded to him by said city of Havana, or to parties that may be named by him or in his interest, then said party of the first part will pay to said party of the second part or to his executors, administrators or assigns the sum of one hundred and seventy-five thousand dollars, lawful money of the United States in the manner and at the times following, that is to say: Out of the payments made to the party of the first part or to the person or persons named by him or in his interest, by the said city of Havana for the construction and erection of said water works the party of the first part will forthwith pay to said party of the second part out of said sum an amount which shall be in the same proportion to the amount so received by him as the whole amount one hundred and seventy-five thousand dollars so as afore-

said to be paid by him to the party of the second part is to the whole amount of two million, two hundred thousand dollars so as aforesaid to be received by him from said city of Havana for the construction and erection of said works.

Second. Said party of the first part further covenants, promises and agrees to and with the party of the second part that if any work is done by said party of the first part or by parties that may be named by him or in his interest in or about the construction
58 or erection of said works, not mentioned in the specifications of said works as they have been submitted by the said city of Havana, then the party of the first part will pay to said party of the second part one-eighth of the net profits arising from the performance of said extra work.

Third. The said party of the second part in consideration of the mutual covenants hereinbefore contained, hereby covenants, promises and agrees to and with the party of the first part that he will proceed to Havana without delay, at his own expense and there as the representative of the said party of the first part use all lawful means and give such time and attention as may be necessary for the purpose of obtaining the contract aforesaid, and in the manner aforesaid and that he will pay and be responsible for all commissions that he directly agrees to pay to any persons in the said city of Havana, in and about the obtaining of said contract, up to the time that the said contract is regularly executed and delivered to the party of the first part or to the persons he may name or who may be in his interest.

Fourth. It is further covenanted, promised, and agrees between the parties hereto, that in case the contract for the water works should be awarded to the said party of the first part or to his representatives at a price less than two million, two hundred thousand dollars then the commissions to be paid to the party of the second part shall be reduced as follows: There shall be allowed
59 and paid to him the sum of one hundred thousand dollars, and from the remaining seventy-five thousand dollars, there shall be deducted such a proportionate sum as the amount of the contract price shall bear to the said two million, two hundred thousand dollars.

It is understood and agreed between the parties hereto that the prompt payment of all commissions is guaranteed by the party of the first part and all such payments shall be made immediately upon the payment being made to the contractor or his representatives and such commissions will be paid either in Havana or in the city of New York at the option of the party of the second part, and also that if for any reason the contract hereinbefore referred to should not be given by the city of Havana to the party of the first part or any one in his interest, the party of the second part shall have no claim for services or disbursements against the party of the first part.

Fifth. It is further covenanted and agreed that the covenants, promises, and agreements herein contained shall ensure to the benefit

of and be binding upon the executors administrators and assigns of the parties hereto.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

L. MARTINEZ. [L. S.]
DAN'L RUNKLE. [L. S.]

Sealed and delivered in presence of—

60 The word October on 2nd line of 1st page erased and word November inserted before execution—

EMMET R. OLCOTT.

STATE OF NEW YORK, }
City and County of New York. }

On the second day of November, eighteen hundred and eighty-one, before me personally appeared Daniel Runkle and Lino Martinez, known to me and to me known to be the individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

In witness whereof I have hereto set my hand and official seal, at the city of New York, the day and year first above written.

ANTONIO C. GONZALIZ,
Notary Public, N. Y. Co. [L. S.]

61 (Shown Exhibit B 3.) I have seen that paper before; it is a power of attorney. I drew it. I know that that paper was never used or acted under. Subsequent to the execution of that paper other powers of attorney were executed by Mr. Runkle to Mr. Mestre in relation to the matters therein referred to. They were executed in the city of New York and sent to Mr. Mestre in Havana. These subsequent powers of attorney were in the Spanish language, with which I am familiar. I received the telegrams heretofore mentioned—Exhibits D 6, D 7, D 8, and D 9. They were received in due course from the cable office in New York, and I replied to them. I addressed the reply to the telegrams in Spanish to Mr. Mestre and got an acknowledgment.

(Telegrams offered in evidence and objected to on the ground that they have not been properly proved. Objection sustained. Exception by defendant.)

(EXHIBIT D 6.)

HAVANA, *July* 23, 1884.

To Olcott, 35 Broadway, N. Y.:

Telegraph if power is coming to-morrow steamer.

MESTRE.
MARTINEZ.

(Exhibit D 7.)

Havana, *July* 18, 1884.

To Olcott, 35 Broadway, N. Y.:

Poderos en mano insuficientes urge enuie vapor manana nuevo poder espanol de Runkle, Lyles y Gilson, Maddison, a
62 Martinez, Mestre, ratificando anteriores seis marzo 7 veintisois junio ampliandolos. Especificamente para rescindir contrato emprestito aceptar devolucion deposito dejando ayuntamiento libertad accion y ortogando mutual general release to do bien explicado.

MESTRE.
MARTINEZ.

(Translation of Exhibit- D 7 & 8.)

Havana, *July* 18, 1884.

To Olcott, 35 Broadway, N. Y.:

The powers received are insufficient. It is urgent to send by tomorrow's steamer new Spanish power, in Spanish, for Runkle, Lyles, and Gilson, Maddison to Martinez, Mestre, confirming the power of March 6th and June 26th, amplifying them specially to cancel the contract to loan, to accept return of deposit, giving common council liberty of action, and to execute a general release; all well explained.

MESTRE.
MARTINEZ.

(Exhibit D 9.)

Havana, *July* 22, 1884.

To Olcott, 35 Broadway, N. Y.:

Send, anyhow, first steamer, power according telegram eighteenth.

MESTRE.
MARTINEZ.

Telegram of March 27th received in evidence, marked Exhibit D 12. The translation is as follows:

Runkle, Lyles, Gilson, care Olcott, 35 Broadway, N. Y.:

I urge forward pending powers. I protest against damages, delay.

MARTINEZ.

That bears date March 7th, 1884. These other telegrams bear date in July.

Acting for Mr. Runkle, the defendant, with the subsequent powers of attorney sent to Mr. Mestre, as I have testified, I sent letters of instruction.

The receipt of these powers of attorney, written in the Spanish language, was acknowledged by Mr. Mestre. I have a letter
63 of instructions sent to Mr. Mestre accompanying these powers of attorney. With the power of attorney dated June 24,

1884, written instructions were sent on June 25th, 1884. A power in Spanish went also. My letter of instructions is dated June 25th and went with the power in evidence. (Letter of instructions is offered in evidence. Objected to as incompetent. Objection sustained. Exception by defendant.) I remember Mr. Runkle himself preparing and forwarding a letter to Mr. Mestre. I know that that letter was sent; I remember seeing an acknowledgment of it. (Letter produced.) This is a copy of it. It is my handwriting, signed by Mr. Runkle in my presence.

(Said letter offered in evidence, received, and marked Exhibit D 13.)

NEW YORK, *July* 31, 1884.

D'n J. M. Mestre, 108½ Aguiar St., Habana, Cuba.

DEAR SIR: I see no objection to the manner of settling the Habana water works contract as shown in the draft of the proposed memorandum to be signed at the time of payment and returns of the $64,000, except that either in the said paper or some other I would like it to be stated that the balance claimed by Mr. J. C. Burnham or his firm is against Mr. Luis Martinez and the Charnwood Forest stock, and in no event against me individually; and also that should the Charnwood Forest stock on a sale not
64 bring the $18,000 claimed by Mr. J. C. Burnham and his firm there shall be no claim against me individually or otherwise for any difference.

You will please observe the instructions of Mr. E. R. Olcott as to forwarding the stock to Messrs. Alexanders & Company, of London, for sale, remittance of the proceeds to New York.

Perhaps Mr. Burnham will be willing to take the stock and pay something in cash. Will he make an offer and of how much?

Very truly yours, DAN'L RUNKLE.

I learned from Mr. Burnham that this Charnwood Forest stock had been given by the London branch of Mr. Burnham's firm or his agents in London as collateral for the payment of the draft that had been delivered in Havana. These drafts, which were taken up by Burnham on the liabiiity or responsibility of Martinez, were forwarded to Baring Brothers, London, the representatives of Burnham, and, not being paid, were protested for non-payment and afterwards that stock was delivered by Maddison as security for the protested drafts. I saw Burnham in relation to the matter of this paper of August 4. I had an interview with him in New York on the 22nd day of August, 1884. Mr. Burnham stated that he had come to confer as to the sale of the Charnwood Forest stock. I told Mr. Burnham that Mr. Runkle had given me full instructions in the matter, and that there was no necessity of seeing Mr. Runkle. Mr. Burnham said, Does
65 Mr. Runkle desire to take up the shares of stock? My answer was, No. Then he said, Does Mr. Runkle wish the stock sold? My reply was, Mr. *Mr.* Runkle does not assume any liability at all, but there would seem to be no objection to a sale of

the stock. Suppose, returned Mr. Burnham, the stock does not bring enough to pay me my balance, is Mr. Runkle to pay me any part of the difference? Mr. Runkle, I replied, does not consider himself obligated to assume the payment of the difference in any way; he simply acted as he did for the purpose of facilitating the return to Mr. Martinez of the $64,000 deposited, and his only demand was that if there should be a surplus over the amount you would be entitled to, it should in equity be given to him to reimburse him for his outlay. Mr. Burnham thereupon observed that Mr. Martinez is the one to make good to me the difference. Yes, so I understand, was the reply. Mr. Burnham said that Maddison had given him absolute power to sell the stock for any sum that he might choose, and that he would go to London in the next ten days and see his correspondents, Baring Brothers, & have them give him the name of some good broker through whom he could sell the stock for the best price he could get. I have made it my business to familiarize myself with the laws of Cuba. I practice there and have familiarized myself with the practice of law as practiced there. We have a specialty of the practice of law in foreign countries. We have an office in the city of Havana and in the city of
66 Mexico. We represent the Spanish government and its consul in New York, the Mexican government and its consul in New York, and various other potentates throughout the world. I have studied Spanish law and am familiar with the practice in Spanish courts in all matters relating to contracts.

(To Mr. Lawrence:) I have not practised in Spanish courts.

Q. What is the law in Cuba in relation to the execution of assignments—by whom must such instruments be executed to make them valid?

(Question objected to. Objection sustained. Exception by defendant.)

I have made a translation of the contract of August 4, 1884; that translation is correct.

(Translation offered in evidence, received, and marked Exhibit D 14. It is as follows:

This present is to certify, to which I desire to give all the force of a public instrument, that I, Mr. S. I. Burnham, having received from Mr. Lino Martinez the *sum* of sixty-four thousand dollars, gold, on account of the sum of $83,085.36 which results in my favor from the account that under this date has been presented to Mr. Lino Martinez in relation to the drafts drawn on the 24th of March, 1882, by Mr. H. J. Overman upon Mr. F. C. Maddison, of London, and endorsed to my order by the said Mr. Lino Martinez, the which were protested for non-payment and protected in due course by the Messrs. Baring Brothers Company, of London, as the representatives of the Messrs. J. C. Burnham & Company, have agreed in regard to the balance of $19,085.36 that still remains unpaid as follows:
67 *remains unpaid as follows:*

Recognizing, as I recognize, Mr. Daniel Runkle as the as-

signee of Mr. Walter H. Gilson, who, in his turn, was the assignee of Mr. C. F. Maddison for himself and for the firm of Maddison & Company, I bind myself to place at the disposal of said Mr. Runkle the shares of the Charnwood Forest Railway Company, of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison & Company deposited in my hand and transferred to me as guarantee for the reimbursement of the amount of the aforesaid drafts and the expenses and interest relating thereto so soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which is to be done within the period of three months, counting from the date hereof, it being left to his discretion either to do so directly or to direct that of the said shares deposited there to be sold (in accordance with such instructions that for such purpose he may give) such portion as may be necessary for the reimbursement of such balance of $19,085.36, which being covered, the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares.

The sum owing shall carry interest at nine per cent. per annum until its complete payment.

Mr. José Manuel Mestre, as the attorney-in-fact of Mr. Runkle, subscribes this present stipulation by way of assent in the name of his principal.

68 That in order that it may have all its due effects this is done and signed in triplicate of the same tenor, one for each party, at Havana the 4th of August, 1884.

Memorandum as to Corrections.

NOTA.—At the moment of signing Mr. S. I. Burnham stated that he assigns and transfers to Mr. Candido Zabarte y Paris all the rights and rights of action that belong to him under the foregoing instrument, subrogating him in his place and stead by reason of having received from him the aforesaid balance of $19,087.36, but on the understanding that said Burnham remains always bounden to sell the shares of stock in question to the order of Mr. Runkle, as set forth, and to deliver to the latter the balance of the proceeds of the sale and the shares remaining.

Dated as above.

JOSÉ MAN'L MESTRE.
L. MARTINEZ.
S. I. BURNHAM.
CAND. ZABARTE PARIS.

As witnesses:
E. COSCULLUELA.
ANTONIO PAIS.

Defendant rests.

LINO MARTINEZ recalled as a witness for the plaintiff:

The original of the letter from Daniel Runkle to José Mestre, dated July 31, 1884, was never shown to me, nor did Mr. Mestre ever

show anything to me about having received such a letter containing any such instructions as that. In the ordinary course of the mail, in July, 1884, it took a letter four or four and one-half
69 days to reach Havana from New York.

Cross-examination:

Mr. Mestre never showed me any of these letters or powers of attorney in relation to this.

Case closed.

The defendant thereupon requested the court to find and decide as follows:

First. That it does not appear that Mestre had any authority to assume an obligation on the part of the defendant.

(Which request the court refused, and to which refusal the defendant duly excepted.)

Second. That the contract of August 4, 1884, does not impose any liability upon the defendant.

(Which request the court refused, to which refusal the defendant duly excepted.)

The court thereupon found as follows:

First. That on the eighteenth day of March, eighteen hundred and eighty-two, contracts for a loan and water works were awarded by the city of Havana to Daniel Runkle, the defendant; Walter H. Gilson, Joseph H. Lyles, and Maddison & Co., of London, and on the 27th of the same March Lino Martinez deposited the sum of $64,000 in Spanish gold in the municipal treasury of Havana as a guarantee for the proposition which Messrs. Gilson, Runkle, Lyles, and Maddison & Co., of London, had presented to the municipality of Havana for the loan of $5,600,000.

70 Second. That Martinez Martinez had been employed by Runkle, who was acting for himself and his co-contractors to raise the amount required to be deposited as a guarantee for the fulfillment of a contract, and in pursuance of this employment Martinez had borrowed the sum of $64,000 from the plaintiff, Burnham.

Third. Runkle, Gilson, and Lyles undertook to repay this sum of $64,000 to Martinez at any time he should ask for the same, if it should be demanded by the city in consequence of their not having carried out the contract for the water works or for any cause for which the city might retain the deposit, and as a remuneration and for the payment of interest to Martinez they assigned to him the amount of $25,000, payable monthly, at the rate of one and $\frac{187}{1000}$ per cent. from the amounts they should receive for the works. This undertaking fell through in consequence of the final abandonment of the contracts, but the fact remains that it was the understanding of all the parties that Martinez was to be repaid the sum of $64,000, with interest, and also to be remunerated for his services or expenses.

Fourth. Subsequently to these proceedings Runkle became the

assignee of all the rights and interests of his co-contractors
71 under their contract with the city of Havana, and thence-
forward was solely entitled to all the profits that might accrue from its performance and liable for the consequences of its non-performance.

Fifth. Runkle failed to perform the contract for the water works and by reason of his default the sum deposited with the city of Havana as a guarantee was forfeited and he became liable for such damages as were sustained by the city on account of his failure. He also became responsible to Martinez for the repayment of the guarantee deposited, with interest and expenses incurred in effecting the loan from Burnham, amounting in all to the sum of $83,087.36, as per account stated between Burnham and Martinez on the 4th of August, 1884.

Sixth. Runkle, being desirous of procuring a full and general release from all liability on account of his connection with the contract for the loan and water works, executed in due form on the 25th of June, 1884, a letter of attorney to José M. Mestre, who was in the city of Havana, authorizing him to demand and receive such sum or sums of money and property of any kind of right belonging to Runkle, "under or in connection with the contracts for the loan
and water works, made in consequence of the public bid there-
72 for on the 18th of March, 1882, and which loan and contract
were awarded to me (him) together with Walter H. Gilson and Maddison & Co., and also Joseph H. Lyles," * * * "and to do all things necessary in the judgment of my said attorney and to obtain my release from all liability as one of the contractors in connection with the said loan and water works, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present," etc.

Seventh. By virtue of the authority conferred on him by the aforesaid power of attorney, Mestre, on the fourth day of August, 1884, acting for and in the name of Runkle, entered into a written agreement of stipulation in the Spanish language with Burnham, of which the following is a translation:

This present is to certify, to which I desire to give all the force of a public instrument, that I, Mr. S. J. Burnham, having received from Mr. Lino Martinez the sum of sixty-four thousand dollars, gold, on account of the sum of $83,087.36, which results in my favor from the account that under this date has been presented to Mr.
Lino Martinez in relation to the drafts drawn on the 24th of
73 March, 1882, by Mr. H. J. Overman upon Mr. E. C. Maddison,
of London, and endorsed to my order by the said Mr. Lino Martinez, the which were protested for non-payment and protected in due course by the Messrs. Baring Brothers and Company, of London, as the representatives of the Messrs. J. C. Burnham and Company, have agreed in regard to the balance of $19,087.36 that still remains unpaid as follows:

Recognizing, as I recognize, Mr. Daniel Runkle as the assignee of Mr. Walter Gilson, who in his turn was the assignee of Mr. E. C. Maddison, for himself and for the firm of Maddison and Company, I bind myself to place at the disposal of said Mr. Runkle the shares of the Charnwood Forest Railway Company, of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison & Company deposited in my hands and transferred to me as guarantee for the reimbursement of the amount of the aforesaid drafts and the expenses and interest relating thereto so soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which it is to be done within the period of three months counting from the date hereof, it being left to his discretion either to do so directly or to direct that if the said shares deposited there be sold (in accordance with such instructions that for such purpose he may give) such portion as may be necessary for the reimbursement of such balance of $19,087.36, which being covered,
74 the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares.

The sum owing shall ~~carry~~ interest at nine per cent. per annum until its complete payment.

Mr. Jose Manuel Mestre, as the attorney-in-fact of Mr. Runkle, subscribes this present stipulation by way of assent in the name of his principal.

That in order that it may have all its due effect this is done and signed in triplicate of the same tenor, one for each party, at Havana, the 4th of August, 1884.

Memorandum as to Corrections.

NOTA.—At the moment of signing Mr. S. J. Burnham stated that he assigns and transfers to Mr. Candido Zabarte y Paris all the rights and rights of action that belong to him under the foregoing instrument, subrogating him in his place and stead by reason of having received from his the aforesaid balance of $19,087.36, but on the understanding that said Burnham remains always bounded to sell the *sahres* of stock in question to the order of Mr. Runkle, as set forth, and to deliver to the latter the balance of the proceeds of the sale and the shares remaining. Dated as above.

(Signed) JOSÉ MAN'L MESTRE.
L. MARTINEZ.
S. J. BURNHAM.
CANDO ZABARTE PARIS.

As witnessesses:
E. COSCALLUCLA.
ANTONIO PAIS.

75 Eighth. Runkle had no property or debts belonging to him in the city of Havana and the letter of attorney was executed for the sole purpose of authorizing Mestre to procure his release from any and all liability as a contractor in connection with

the water works, and there is no proof that Mestre received notice of the revocation of the letter before he signed the agreement with Burnham.

Ninth. Martinez exerted himself to obtain from the authorities of Havana the release of Runkle and the return of the deposit money in consideration of Runkle entering into the agreement with Burnham.

Tenth. The right of action accruing to Burnham under the agreement was assigned by him to Candido Zabarte y Paris, and by the latter to Francisco G. Mediavilla.

The opinion of the court is that the agreement of August 4, 1884, was assented to by Runkle through Mestre, who had full power under the letters of attorney to bind his principal. The consideration for the agreement on the part of Runkle was his release from liability under his contract with the city of Havana, the return of the deposit money both obtained by Martinez, and the re-
76 muneration to Martinez for interest and expenses incurred in making the loan from Burnham, and for Martinez personal services in effecting this consummation. In making the agreement of August 4 Runkle only exchanged creditors. Martinez was indebted to Burnham in the sum of $19,087.36, and Runkle was indebted to Martinez for a like amount. By the agreement Runkle assumed the payment of this sum to Burnham in the manner set out in the agreement.

Judgment will be entered for the plaintiff for $19,087.36, with interest at the rate of nine per cent. per annum from August 4, 1884, to the date of the entry thereof—that is, for the period of five years three months and eleven days, being $9,070.46, amounting, principal and interest, to the sum of $28,157.82.

77 The defendant thereupon duly excepted to the general judgment of the court for the plaintiff and against the defendant, as founded upon the foregoing special findings, on the ground that the said special findings do not support and warrant in law a judgment for the plaintiff and against the defendant.

And because the said several matters do not appear by the record of this action, the defendant, for the purpose of reviewing the various rulings and decisions of law to which exceptions were taken by him, has caused this bill of exceptions to be prepared, and the said justice has signed and sealed the same this fifteenth day of September, 1890.

L. E. WALES, [L. S.]
Dist. Judge.

78 UNITED STATES OF AMERICA, }
District of New Jersey, } ss:

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the cause of Santiago J. Burnham, who sues for the use of Francisco G. Mediavilla, against Daniel Runkle, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Trenton, in said district, this tenth day of October, A. D. 1890.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: Case No. 14,391. New Jersey C. C. U. S. No. 266. William Runkle and Harry G. Runkle, administrators of Daniel Runkle, deceased, plaintiffs in error, *vs.* Santiago J. Burnham, who sues for the use of Francisco G. Mediavilla. Filed October 17, 1890.

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 266.

WILLIAM RUNKLE ET AL., ADMINISTRATORS OF DANIEL RUNKLE, DECEASED, PLAINTIFFS IN ERROR,

vs.

SANTIAGO J. BURNHAM, USE OF FRANCISCO G. MEDIAVILLA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 18, 1893.

(14,291.)

(14,291.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 266.

WILLIAM RUNKLE ET AL., ADMINISTRATORS OF DANIEL RUNKLE, DECEASED, PLAINTIFFS IN ERROR,

vs.

SANTIAGO J. BURNHAM, USE OF FRANCISCO G. MEDIAVILLA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

INDEX.

	Original.	Print.
Stipulation for addition to record	1	1
Transcript of testimony	3	1
Testimony of Daniel Runkle	3	2
Colloquy between court and counsel	25	14
Testimony of Lino Martinez	27	15
Colloquy between court and counsel	33	18
Testimony of Lino Martinez (continued)	36	20
Colloquy between court and counsel	54	30
Testimony of Daniel Runkle	60	33
Emmit B. Olcott	66	34
Lino Martinez (recalled)	71	39
Bill of particulars of demand	73	40
Translation of agreement in Spanish	74	40
Clerk's certificate	77	42

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1893.

1 United States Supreme Court.

WILLIAM RUNKLE and HARRY G. RUNKLE, Administrators of Daniel Runkle, Deceased, Plaintiffs in Error,
vs.
SANTIAGO J. BURNHAM, Who Sues for the Use of Francisco G. Mediavilla.

October Term, 1893.
Term No., 266.

It is stipulated between the counsel of the respective parties in the above-stated cause as follows:

1. That the clerk of the United States circuit court for the district of New Jersey do amend his return made in the case of Santiago J. Burnham *vs.* Daniel Runkle by adding to the same the transcript of testimony taken on the trial of said cause and the bill of particulars in said cause, both of which are on file in the office of said clerk.

2. That upon the receipt of such amended return by the clerk of the United States Supreme Court he do cause the same to be printed as part of the record in the above-stated cause in the United States Supreme Court.

HAMILTON WALLIS,
Of Counsel for Plaintiffs in Error.
ROBERT O. BABBITT,
Of Counsel for Defendant in Error.

2 [Endorsed:] United States Supreme Court. William Runkle and Harry G. Runkle, administrators of Daniel Runkle, deceased, plaintiffs in error, *vs.* Santiago J. Burnham, who sues for the use of Francisco G. Mediavilla.

3 United States Circuit Court, District of New Jersey.

SANTIAGO J. BURNHAM, Who Sues for the Use of Francisco G. Medsavilla,
vs.
DANIEL RUNKLE.

Examination of the defendant before trial in the above-entitled cause, at the instance of the plaintiff, taken before me, Isaac Romaine, a commissioner of said court, at my office, No. 245 Washington street, Jersey City, on Tuesday, August 31st, 1886, at ten o'clock in the forenoon, in presence of Robert Laurence, counsel for plaintiff, and Hamilton Wallis, counsel for defendant.

Whereupon the examination was adjourned, at the request of counsel for defendant, to Tuesday, September the 7th, 1886, at the same time and place.

At which time and place the examination was further adjourned, at the request of counsel for defendant, to Friday, September 10th, 1886, at the same time and place.

At which time and place the examination was resumed in presence of the counsel of the respective parties.

It is agreed between counsel of said parties that the testimony shall be taken by a stenographer and afterward reduced to writing, and that the signature of the defendant to said testimony be waived.

DANIEL RUNKLE, the defendant above named, being produced and duly sworn, on his oath says:

Q. You are the defendant in this case?

A. Yes, sir.

Q. Where do you reside?

A. Asbury, New Jersey.

Q. In the year 1882 where you interested in certain contracts in the city of Havana?

Objected to as too indefinite.

A. I do not recollect what year it was.

Q. Were you ever interested in the erection of water works?

A. Yes, sir.

Q. Was that about the year 1882?

A. About that time, I presume.

Q. Were other persons associated with you in interest in the contract?

A. Yes, sir.

Q. State who they were.

A. Mr. Gilson and Mr. Lyle.

Q. That was all—any one else?

A. Mr. Martinez.

Q. Where did Messrs. Gilson and Lyle reside?

A. Mr. Gilson resided in Jersey City and, I think, Mr. Lyle lived in Long island.

Q. And Mr. Martinez?

A. Havana, Cuba, I think. I am not sure about that.

Q. Will you please state shortly in what way Mr. Martinez was interested in the contracts?

A. Well, he put up the security; he had his interest in that way.

Q. Was he engaged to procure the contract for the others?

Objected to on the ground that the arrangement with Martinez was in writing and that writing must be produced.

A. As I understood it, Mr. Martinez came in and gave the security for the work, for the fulfilment of the contract, and was to have an interest, and that is about all I know about that.

Q. Can you state the amount of security that was required?

Same objection.

A. ($64,000) sixty-four thousand dollars.

Q. And with whom was that to be deposited?

Same objection.

A. That I do not know; I suppose with the city authorities.
Q. Was that $64,000 deposited?
A. Of my own knowledge, I do not know that it was.
Q. State what you know on the subject.

Objected to as calling for hearsay.

A. I understood it was, but of my own knowledge I do not know.
Q. Was that contract carried out for the erection of water works?

Objected to on the ground that there is no evidence of any contract for the construction of water works nor its terms, and whether it was carried out or not is too general.

A. No, sir.

Q. Did you become the assignee of your associates—that
6 is, Gilson and Lyle?

Objected to on the ground that whatever assignment there was was in writing and it must be produced and proved.

A. That is in writing and can be produced.
Q. I only want your knowledge on that subject.
A. I am not positive about that; I think so. Whatever there is it is in writing. It is some time ago and I do not recollect.
Q. Was the contract finally rescinded?

Objected to on the ground that if there was a rescission it is in writing and must be produced.

A. I understood so.
Q. Who were your attorneys in New York representing you during this time?
A. Olcott & Mestre.
Q. That is the firm name now?
A. Yes, sir.
Q. Did you have a legal representative in Havana?
A. No, sir; Mr. Mestre was our representative there.
Q. Was that the same Mr. Mestre that was partner with Mr. Olcott in New York?
A. Yes, sir.
Q. Did this Mr. Mestre represent you throughout in all these dealings in Havana?
A. Yes, sir.
Q. When the contract was rescinded?

A. No, sir.
7 Q. Who acted for you in that matter?
A. Mr. Mestre.

Q. When the contract was rescinded what became of the $64,000 guarantee?
A. It was returned.
Q. To whom?
A. The parties who gave it; I presume Mr. Martinez; he was the one who was to get the guarantee.

Q. Do you know whether Mr. Martinez furnished that of his own money or whether he raised it from others?

A. I do not know.

Q. Do you know Mr. S. J. Burnham?

A. Not personally.

Q. You know who he is?

A. Yes, sir.

Q. Where does he live?

A. I presume he lives in Havana. I don't know anything about it.

Q. Had you heard of him before being connected with this suit?

A. Yes, sir; I had.

Q. When did you first hear of him?

A. Well, when we tried to negotiate the bonds.

Q. You speak of negotiating bonds. What do you mean by that?

A. The carrying out of this contract depended on the successful negotiation of these bonds.

Q. How did you know of Mr. Burnham in connection with the negotiation of the bonds?

8 A. I had heard of him through Mr. Lyle or some of them in that connection.

Q. In what connection?

A. I think it was in connection with this suit—that is, in regard to the $64,000 I heard of him first. I don't know that I heard of him in connection with the contract.

Q. Do you know whether advances of money were made on account of this contract?

A. No, sir.

Q. In connection with the contract in any way?

A. No, sir.

Q. You know of no money advanced, except the $64,000 guarantee?

A. That is all.

Q. Then, according to your knowledge, do I understand you to say that the only money expended by anybody in connection with this contract was the guarantee of $64,000?

A. That was not the only money that was expended. I had to spend money in negotiating the bonds.

Q. Do you know or have you heard of the firm of Madison & Co.?

A. I have heard of them.

Q. In what way have you heard of them in connection with this contract?

A. In regard to the negotiation of the bonds.

Q. And in what way?

A. They proposed to negotiate the bonds.

Q. They were of London?

A. Yes, sir.

9 Q. Then some efforts were made to negotiate the bonds through Madison & Co.?

A. Yes, sir.

Q. Do you know whether any expenditures were made in that connection?

A. No, sir.

Q. You don't know whether they were or not?

A. No, sir.

Q. Do you know whether this $64,000 guarantee when returned by the city authorities was retained by Mr. Martinez or not?

A. I don't know anything about it.

Q. If not returned to Mr. Martinez you, I understand, was responsible to him for that amount?

Objected to because it assumes something that is not proved. Whatever contract there was was in writing and the writing must be produced and proved, and because the question calls for the construction and terms of the written instrument.

A. Of course, the money would have to be given to Mr. Martinez, as the party giving the money, and to the parties making the contract.

Q. And you became the assignee of the parties making the contact, did you not?

Objected to on the ground that if there was an assignment it must be in writing and must be produced and proved.

10 A. I think that was the fact, sir.

Q. And you were assignee of their interest not only in the contract for the erection of the water works, but also for the negotiation of the bonds?

Same objection, on the same ground and because it asks the witness to construe a written contract.

A. No; I think not.

Q. I understood you to say a few moments ago that the arrangement for the negotiation of the bonds was taken in connection with the contract for the erection of the water works?

A. Yes, sir.

Q. And were not the same persons interested in each, the contract and the negotiation of the bonds?

Objected to on the ground that the contract is the best evidence and will speak for itself.

A. Yes, sir.

Q. And you became the assignee of all those persons, did you not?

Objected to on the ground that the assignment, being a written instrument, must be produced and will speak for itself.

A. Yes, sir; I became assignee of the parties.

Q. After the $64,000 was returned by the authorities of the city of Havana was there a settlement made among those parties in relation to this matter?

Objected to because it assumes a fact not proven.

A. I paid the bills after Mr. Lyle and Mr. Gilson had failed and I became responsible for what was due.

11 Q. By paying the bills, please explain what you mean

A. Lawyers' fees, &c., the traveling expenses, the engineer, &c.

Q. To persons in this country or in Havana?

A. This country.

Q. Did you pay any bills to any person in Havana?

A. Nothing except Mr. Mestre.

Q. And that was for legal services?

A. Yes, sir.

Q. All that was done in Havana on your part was done by Mr. Mestre?

A. Yes, sir.

Q. And by authority from you?

Objected to because it must appear whether the authority was in writing or otherwise.

A. He was my attorney.

Q. And was he authorized to act for you generally in relation to these contracts in Havana?

Objected to for same reason.

A. All legal matter that I had to be attended to there was done by him.

Q. Question repeated.

Objected to on the ground that it is already answered.

A. He attended to all my legal matters there.

Q. What was he authorized by you to do?

Objected to on the ground that if there is a written authority it must be produced.

A. He was authorized as my attorney to attend to my interests.

12 Q. Do you know of any settlement that was made after the re-cis-ion of the contract for the erection of the water works between Mr. Mestre, acting for you, and Mr. Burnham?

Objected to because it assumes a fact not proven and because immaterial.

A. I received word from Mr. Mestre that the money had been returned, the deposit, and was all settled.

Q. Is that the extent of the information that you received from Mr. Mestre?

A. As far as I recollect; yes, sir.

Q. Did you ever hear, in connection with this matter, of certain shares of the Charnwood Forest Railroad Company?

A. I did.

Q. What relation did you hear that those shares bore to any other matters connected with these contracts?

Objected to as immaterial.

A. I could not tell you.

Q. From whom did you hear anything concerning them?

A. I think it was from Gilson.

Q. Did you ever hear anything from Mr. Mestre in regard to it?

A. Not to my knowledge.

Q. Did you learn that those shares was put up as a collateral security for any sum of money?

A. My understanding was from Mr. Gilson, I think, that they took them to secure themselves, but for what I don't know.

Q. Did you ever hear of Mr. Burnham having any connection with them?

13 A. Yes, sir.

Q. How and when did you hear that?

A. I think I heard that from Mr. Olcott.

Q. And when first?

A. After the money had been returned to the parties depositing it.

Q. And did you learn that a settlement had been affected with Mr. Burnham?

The question is objected to, so far as it relates to any conversation held between witness and Mr. Olcott, as the same was a privileged communication between lawyer and client, and the witness can decline to answer it.

A. No, sir.

Q. Have you ever heard to this day that any settlement was effected with Mr. Burnham?

The same objection, and I caution the witness that he is not compelled to answer any question that relates to any conversation held between him and Mr. Olcott, his attorney.

A. My knowledge of Mr. Burnham was through Mr. Olcott.

Q. At the time when the contract was rescinded was there any money due to you in relation to this contract by persons of Havana?

Objected to because it assumes a fact not proven.

A. No, sir.

Q. And at that time, unless Mr. Martinez had got back his

14 $64,000, you was responsible to him for that?

Question objected to as argumentative, as calling for a construction of a contract, and because the whole arrangement was in writing and must be produced.

A. I was bound to make returns to the parties making the contract.

Q. Any other sums of money, if there were any, paid or advanced on account of the parties who were engaged in these contracts you were also bound to reimburse, were you not?

Same objection.

A. No, sir.

Q. Were you not bound to pay any indebtedness incurred on account of these contracts by the parties whom you represented as assignee?

Objected to as calling for a conclusion of law and a construction of a written instrument.

A. Any just debt I had to pay.

Q. Did Mr. Mestre keep you informed of what was done in Havana during the negotiations in regard to these contracts by letter?

A. I don't know that Mr. Mestre was in Havana when these contracts were made.

Q. I mean during the time he was there?

A. I suppose he did.

Q. Were his letters directed to you or to the firm in New York?

A. To the firm in New York.

Q. And then you received all your information from the
15 firm in New York?

A. Yes, sir.

Q. What firm?

A. Olcott & Mestre.

Q. Then all your knowledge as to what took place in reference to the business affairs connected with these contracts came to you in that way?

A. No, sir; part came from Gilson in regard to the contracts; the getting of the contract.

Q. But all the knowledge that you obtained of Mr. Mestre's transactions of your business there came to you in this way?

A. Yes, sir.

Q. And that information was given to you by whom from the office in New York of Olcott and Mestre?

A. Mr. Olcott.

Q. Then the information that came to you from Mr. Olcott in regard to Mr. Burnham came to you in the same way as all the other information that you obtained?

A. Yes, sir.

Q. I now ask the witness to state what he heard from Mr. Olcott in relation to Mr. Burnham's connection with this contract.

The same objection is made—that it is incompetent, as calling for a communication between a lawyer and his client—and the witness is cautioned that he need not answer the question.

A. I understand Mr. Olcott to say that Mr. Burnham had
16 called on him and asked me, through him, to take up this railroad stock that he held, to take it up and pay him money for it, which I objected to do; I think that is the first time that I knew Mr. Burnham had anything to do with it.

Q. Was it communicated to you at Mr. Burnham's request that you should take up these securities?

Same objection and the same caution.

A. That he had taken the stock and that I had the privilege of redeeming it if I wished to and which I didn't wish to do.

Q. Was it communicated to you for what he had taken the stock for?

Same objection; same caution.

A. It was, but I just don't recollect now what it was.

Q. Was it that he had taken it in a settlement that was effected after the contract had been rescinded?

Same objection; same caution.

A. No; I think not.

Q. Did you learn in what manner he had procured that stock?

A. I understood that he had taken it as a guarantee for himself for money loaned.

Q. Did you understand to whom money was loaned or for whose benefit?

Objected to on the same ground, if it was understood from Mr. Olcott it was a privileged communication, and the witness is cautioned that he need not answer.

A. Mr. Martines, as I understood it.

17 Q. And in what connection with these contracts?

Same objection; same caution.

A. The $64,000? He loaned Mr. Martinez the $64,000 and he put it up as collateral. In that way he got this railroad stock.

Q. Did you learn whether any more had been advanced than this $64,000?

A. No, sir.

Q. Had you ever heard that any more was advanced?

A. No, sir.

Q. Have you ever heard to this day whether any more was advanced?

A. No, sir.

Q. Did you learn that certain drafts had been cashed and taken up by Mr. Burnham?

A. Not to my recollection.

Q. Do you know whether a settlement in writing in relation to the money advanced by Mr. Burnham was effected after the rescission of the contract?

Objected to as too indefinite.

A. I don't know of anything about Mr. Burnham in regard to the contracts of my own knowledge.

Q. What did you learn in relation to any such settlement, if anything?

Same objection.

A. I heard that he had loaned the money and taken this stock as collateral in some shape, I don't know what.

Q. Did you learn that a settlement was effected with him
18 in regard to it?

A. No, sir; I don't know anything about it of my own knowledge. Mr. Martinez was the man that I knew of in regard to the contract.

Q. Did you learn that any settlement or agreement was come to in regard to these matters between Martinez, Burnham, and Mestre?

A. I learned from Mestre that the money was returned by the city, and the matter was settled.

Q. Was that the extent of the information that you got from Mr. Mestre?

A. All that I recollect; yes.

Q. Did you ever receive any information that Mestre, for you, had made a settlement with Mr. Martinez and Mr. Burnham by which you were found to be indebted to Mr. Burnham?

Objected to as immaterial because it didn't appears that Mr. Mestre had any authority to do anything of the kind.

A. No, sir.

Q. Then in the communications received from Mr. Mestre through the firm of Olcott and Mestre, in New York, nothing ever came to your knowledge in regard to a settlement made by him for you with Mr. Martinez and Mr. Burnham? Is that true?

A. The word that came to me was, the matter was settled as the money came from the city.

Q. When did that word come to you, as nearly as you can tell?

19 A. It was when the thing was closed; the day I don't recollect.

Q. Was it in 1884?

A. I think it was.

Q. Have you ever seen either the original or a copy of a paper dated August 4, 1884, signed by S. J. Burnham, Jose Manuel Mestre, Cardido Zabarte y Paris, and L. Martinez?

A. I have no recollection of it.

Q. When did you first learn of it?

A. I don't know just when; it was some time ago.

Q. Give the first time, as nearly as you can.

A. Well, I think it was last fall, but the time I just can't tell.

Q. Well, fix the time, as nearly as you can.

A. I should say probably December or November last, 1885.

Q. When did you first learn that there had been a written settlement?

A. I could not tell you.

Q. It is dated August 2nd, 1884; how soon after that did you learn there was a written settlement of that kind?

A. I cannot tell you.

Q. Can't you give me some idea; was it one month, three months, or what?

A. It was less than three months.

Q. Then three months; you can be sure of that?

A. Yes, sir.

Q. Did you request that the writing be submitted to you; did you ask to see the writing?

20 A. I don't know that I did.

Q. But you knew that there was a writing signed by Mr. Mestre on your part with these other parties?

A. I don't know that I did.

Q. Do you know that you didn't?

A. That is all that I knew, that the matter was reported settled by Mr. Mestre; I didn't bother myself after that.

Q. Then, without inquiring into the details, you left the matter entirely to Mr. Mestre?

A. The matter had been settled and there was nothing to leave; he reported the matter all settled.

Q. You didn't enquire into the details of the settlement, although you knew there was a settlement in writing?

A. No, sir.

Q. You have stated that within three months you learned there was a written settlement?

A. I may have learned so in three months, but I don't recollect.

Q. When you learned there was a settlement in writing did you ask to see the writing?

A. I don't know that I did.

Q. You knew that Mr. Mestre had on your part made a written settlement?

Question objected to.

A. I didn't know it.

Q. But within three months afterwards you did?

A. I do not know as I did; I only suppose I did.

Q. Supposing that you did, do I understand that you

21 knew that Mr. Mestre had on your part signed a written settlement?

A. No, sir; I didn't.

Q. Then, what did you know?

A. I knew that he reported that the matter was all settled and the money returned.

Q. But you have stated that you knew it had been done in writing?

A. No, sir.

Q. That within three months after it was done you learned that it was done in writing?

A. I said I supposed I did; I don't know that I have ever seen that paper until to-day.

Q. You knew that if the settlement was in writing that it was signed by Mr. Mestre on your part, did you not?

A. No, sir.

Q. What was your supposition?

Objection to on the ground that supposition is not evidence.

A. I didn't suppose anything, as he reported the whole matter

settled and I rested there, and I didn't make any further inquiry about it.

Q. Mr. Mestre was there to make a settlement on your part, was he not?

A. Not specially.

Q. Had you anybody else acting for you?

A. I suppose he requested the money returned.

Q. All that was done for you down there at that time was done by Mr. Mestre?

22 A. He was there as my attorney.

Q. Who was taking charge of your business affairs aside from the legal aspect?

A. I had no one specially.

Q. Had you ever any one at all?

A. At that time I may have had, but it was in regard to another matter outside of the water works.

Q. I mean in this connection?

A. No, sir; I had no one.

Q. And you were not there personally during that time?

A. No, sir.

Cross-examination:

Q. You have stated that you understood that there was an agreement entered into in the matter concerning which you have specified by which one Martinez was to get certain securities. Was this arrangement, if there was any such, in writing?

A. Not to my knowledge.

Q. Have you any personal knowledge of it?

A. No, sir.

Q. Did you ever have?

A. No, sir.

Q. Have you ever seen an agreement or a copy of an agreement in writing in relation to the furnishing of security by Martinez?

A. No, sir.

Q. Now, you have stated in your direct examination that in some way you became an assignee of certain parties. Was that arrangement, if any such was made, in writing?

23

A. I cannot tell you; I don't recollect any.

Q. Do you know as a matter of fact and of your own knowledge that you ever did become assignee for any of those parties?

A. No; I don't know that I do.

Q. Did you ever see a written assignment to yourself of their interest to this contract?

A. No, sir.

Q. Did you ever know of the existence of one?

A. No, sir.

Q. As I understand you, Messrs. Olcott and Mestre, of New York, were your attorneys-at-law in this transaction, were they not?

A. Yes, sir.

Q. You have also testified that you understood that a deposit of

$64,000, or thereabouts, was returned to the parties who made the deposits. Have you any personal knowledge of that fact?

A. No, sir.

Q. Is what you have testified to derived from communications to you by others?

A. I have no personal knowledge; what I learned was through others.

Q. Did you ever have any personal knowledge?

A. No, sir; my information came through others altogether.

24 Q. Have you any personal knowledge, or did you ever have, that Madison & Co. made efforts to negotiate the bonds of the city of Havana that you have spoken of, or what efforts they did make?

A. No, sir.

Q. You have looked at this paper dated August 4th, 1884, purporting to be signed by S. J. Burnham, Jose Manuel Mestre, Cardido Sabarte y Paris, and L. Martinez. Did you ever learn of the existence of that paper before this action?

A. No, sir.

Q. You have testified that you supposed you must have heard that a certain settlement was made in writing within three months after the settlement was made. What settlement do you refer to?

A. With the city of Havana, whereby the $64,000 was returned to the depositors.

Q. And that is the only settlement you refer to?

A. Yes, sir.

(Endorsed:) U. S. circuit c't, district of N. J. Santiago J. Burnham, who sues for the use of Francisco G. Medsavilla, *vs.* Daniel Runkle. Examination of defendant before trial at the instance of pl't'ff. Babbitt & Lawrence, att'ys.

Coms. Fees.

By pl't'ff:

Taking test'y, 64 f.	$12 80
Swearing def't	10
One day as coms.	3 00
	$15 90

By def'ts:

Two days' coms.	$6 00

Filed Oct. 11, 1887.

S. D. OLIPHANT, *Clerk.*

25 United States Circuit Court.

SANTIAGO J. BURNHAM
vs.
DANIEL RUNKLE. } In Assumpsit.

Transcript of short-hand notes taken of the testimony given in the above-stated cause on Tuesday, the eighteenth day of December, eighteen hundred and eighty-eight, before Judge Wales, at the United States court-house, in the city of Trenton, N. J.

For the plaintiff appeared Mr. Lawrence.

For the defendant appeared Messrs. Wallis & Edwards.

Mr. Lawrence opened the case on the part of the plaintiff and produced and read the deposition of Mr. Runkle, taken out of court.

The court ruled that such portions of Mr. Runkle's testimony as relate to the written agreement must be stricken out. The other rulings of the court in regard to this testimony will be found on the typewritten copy of Mr. Runkle's testimony.

Mr. Lawrence called upon defendant's counsel to produce the contract regarding the water works. Defendant's counsel replied that he hadn't it.

Mr. Lawrence offered in evidence a power of attorney executed by Daniel Runkle to José M. Mestre, dated June 25th, 1884, the execution of which is admitted by defendant's counsel.

Defendant's counsel objects to the offer on two grounds:

26 1st. That it is not a complete instrument, in that it refers in the body of it to an instrument in writing which is said to be hereunto annexed and made part of this instrument. That is not annexed.

2nd. Because it is not included in the bill of particulars of the complainant's claim in this action, which they furnish to defendant. This is not included.

The COURT: You mean they gave no notice of it?

Mr. LAWRENCE: It is not included in our bill of particulars for the same reason that our evidence is not included. We furnished them a copy of our claim.

The COURT: I think it is competent evidence in regard to one part. It is good to the first part, but not to the second: it is disjointed there—the place where it says, "or by virtue, &c." I think it is competent, subject to the support it may hereafter receive by testimony to be adduced. It is not good as it relates to the transfer, the assignment, but it is competent to a portion of it.

Mr. WALLIS: Will you please point out how much of it is competent evidence?

The COURT: Let me see it. He authorizes this attorney to ask, demand, &c., such sums of money, &c. (the judge continued reading to an- including the sentence "or by virtue of the said deed of transfer or assignment"). It is good up to that point certainly. Of course he may have to prove these contracts.

Mr. LAWRENCE: Then I call your honor's attention to the other portion further on. (Read the balance.)

Mr. WALLIS: "That I, Daniel Runkle, individually and
27 as transferee, &c." That has got to go out; that relates to the other paper.

The COURT: It will have to go in, subject to support by other testimony; if that paper is not supported by other testimony, of course it is of no avail.

Mr. LAWRENCE: My construction of the paper is that it authorizes Mr. Mestre to do what in his judgment is necessary to release Mr. Runkle from liability in connection with that contract for loan and water works. I wish to prove the contract next.

Mr. WALLIS: I would like to have it put upon record, first, that it does not appear in the bill, and, second, that it is not a complete paper. I understand the court to overrule the objection and allow an exception.

The COURT: Yes, sir.

Mr. WALLIS: I ask an exception on both rulings.

The COURT: I say it is in for what it is worth; it has to be connected by other evidence.

LINO MARTINEZ, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination.

(By Mr. LAWRENCE:)

Q. I show witness a contract in the Spanish language bearing date Aug. 2nd, 1884, and I ask the witness if he knows the persons who have signed this contract as subscribing witnesses, Antonio Pais and E. Corculluela; you know those persons?

A. Yes, sir; personally.

28 Q. Do they live in Cuba?

A. Yes, sir.

Q. Did you see them sign this document?

A. Yes, sir; I was there present.

Contract was then offered in evidence and objected to by defendant's counsel as not proven.

Q. Where are they?

A. In Cuba.

Q. Are you one of the contracting parties to this instrument?

A. No, sir; I was only a witness there.

Q. You signed it as a witness?

A. Yes, sir.

Q. You saw it signed by all these parties?

A. Yes, sir.

Defendant's counsel still objects to the contract; the witness is one of the contracting parties; the proper way is to prove it by calling the subscribing witness.

The COURT: He is in no way liable.

Mr. LAWRENCE: No, sir.

Mr. WALLIS: Yes, sir; he is decidedly interested.

Mr. LAWRENCE: His relation is this: He was the person who raised this $64,000—that is, he was responsible to Mr. Burnham by this agreement. Mr. Mestre, on the part of Mr. Runkle, acknowledged Mr. Runkle's indebtedness to Mr. Burnham for this $19,000. Mr. Martinez in that way signed.

Mr. WALLIS: The testimony of the subscribing witness is here; that being the best evidence, no other evidence can be produced.

29 The COURT: I think he can do both.

Defendant's counsel asked an exception to the ruling of the court, which was allowed.

Mr. Lawrence then produced the commission issued to Cuba to take the evidence of the subscribing witness and read it; also the contract. He then offered the contract in evidence.

Defendant's counsel objected to the offer on the ground that the contract had not been proven.

The COURT: Why?

Mr. WALLIS: The only evidence that we have before us now is the testimony of this commission that a certain man who was one of the subscribing witnesses to that contract was a person whose name is signed to that paper. "Did you see the persons whose names purport to be signed to said instrument in writing sign their names thereto?

A. I did see the persons whose name is signed to said instrument in writing as maker thereof." He saw him. He did not see him sign it. He don't say that he subscribed his name as subscribing witness at the time of the execution thereof.

The COURT: I think you had better rely on the witness now on the stand.

Mr. WALLIS: Now, your honor, we have the testimony of the subscribing witness, and if your honor supplements it by the testimony of somebody else we pray an exception.

Exception allowed.

The contract was then admitted and an exception prayed and allowed to defendant's counsel.

Mr. LAWRENCE: I will now read the translation.

30 Mr. WALLIS: We object to that translation.

Q. Will you translate that contract?

Mr. WALLIS: It is usual to show the qualifications of an interpreter.

Q. What is your nationality?

A. Spaniard, Cuban.

Q. Are you well acquainted with the Spanish language?

A. Yes, sir.

Q. Have you spoken it all your lifetime?

A. Yes, sir; I am a native of Havana.

Q. That is your native tongue?

A. Yes, sir.

Q. How long have you resided in this country?

A. I have resided here several time-, from one year to two years.

Q. You consider yourself familiar with the English language also?

A. As far as a foreigner can be. I am not a master of the language, but I think I can translate this.

Q. How will you translate into English that document?

A. This is very difficult. I will do the best I can. Here it is stated that with all the power of a public document—you want it translated word for word?

Q. Turn it into English.

A. It is stated with all the power of a public instrument that I, S. J. Burnham, have received from Mr. L. Lino Martinez the amount of $64,000 in gold, on account of the $83,085.36 that results to my favor on account that this date I
31 have presented to the said Lino Martinez with referenee to the draft drawn in 24th March, 1882, by Mr. H. J. Overman to the account of C. E. Maddison, of London, and endorsed to me by said Lino Martinez, the said draft having been protested for failure of payment, in due time paid by Baring Brothers, of London, in representations of Messrs. J. S. Burnham & Co. I here have agreed in regard to the balance of $19,085.36 that is owing or rather pending of payment yet as follows: Recognizing as I recognize that Mr. Daniel Runkle, assignee of Mr. Walter Gilson, who at his time was assignee of Mr. C. T. Maddison by himself, by the name of Maddison & Co., I pledge myself to put at the disposal of the said Runkle the shares of the company of the Charnwood Forest Railway Company of the nominal value of 14,000 pounds sterling that this Maddison & Co. above mentioned had deposited in my power and have been transferred to me as guarantee, and the payment of the amount of the above-mentioned pounds of sterling and of the expenses and interest corresponding as soon as the said balance will be paid to me of $19,087.36 by the above-mentioned Mr. Runkle, which ought to be done in three months' time, beginning from this date, and will be at his discretion to do this directly or well to dispose that the said shares deposited should be sold according to the instrument that he will give him the amount that it should be necessary for the repayment of the said balance of $19,085.36, and when this will be covered the shares will remain to the entire disposition of Mr. Runkle just the same as any amount
32 in gold that may result from the partial sale of the said shares. The amount owed will have an interest of 9% by the year until the complete payment. Mr. José Manuel Mestre, as an attorney-in-fact of Mr. Daniel Runkle, subscribes the present agreement as proxy of his conformity in the name of his constituency and will have all the due effect. We make and sign three exactly the same, one for each party, in the city of Havana, 4th August, 1884.

Corrected, S. J.—Residue.

Postscript—In the moment of signing this agreement Mr. S. J. Burnham states that he transfers to Mr. Condido Zabaret y Paris all the rights and actions that correspond to him according to the

preceding agreement, subrogating in his place and right in consideration that the above-mentioned balance of $19,089.36 has been paid to him, but it is understood that Mr. Burnham is always pledged to sell the shares above mentioned to the order of Mr. Runkle as aforesaid, and to deliver to the latter the remaining of the product of the sale and the remaining shares.

Date above mentioned.

(Signed) S. J. BURNHAM.
JOSÉ MANUEL MESTRE.
CANDIDO ZABARET Y PARIS.
L. MARTINEZ.

As witness:
E. CORCUELUELS.
ANTONIA PEREZ.

Mr. WALLIS: Now I ask to have this instrument stricken off the record on the ground that it is not the instrument of Mr. Runkle, the defendant; there is no evidence to show that it is; it is not signed by Mr. Runkle.

33 Mr. LAWRENCE: It is signed by Mr. Mestre, his attorney-in-fact.

Recess.

Mr. WALLIS: Now, to go back where we left off, I move to strike out this alleged agreement on the ground that it is not executed by Mr. Runkle nor has any authority been shown in any one else to execute it for him.

The COURT: I overrule your motion. It is stated in the body of the instrument that Mestre signs it as the representative of Runkle.

Mr. WALLIS: Conceding that; but a person can write himself as the representative, and that not by mere words of description. The instrument does not bear or purport to bear the signature of Mr. Runkle, and, further than that, there is no power produced which would authorize Mr. Mestre to execute such an instrument in Mr. Runkle's name.

The COURT: Does not that power of attorney give him such authority?

Mr. WALLIS: No, sir; it is a long way from doing that.

The COURT: Does Mr. Runkle's testimony show that he authorized his attorney to act for him?

Mr. WALLIS: As his authority at law.

Mr. LAWRENCE: He says that Mr. Mestre is the only person in Havana who is attending to his business for him, and that he acted. In the first place, he says his authority in legal matters—that was because of the objection of his counsel that suggested that to

34 Mr. Runkle; but afterwards Mr. Runkle says in his examination that Mr. Mestre was the only person in Havana acting for him, and that all he knew of what was done for him there was through correspondence.

The COURT: He don't say that he specifically authorized him to make the contract for him.

Mr. LAWRENCE: No, sir; he don't say that. This power of attorney I wish to call your attention to now, as I regard it *is* of vital importance in the case. In addition to the ratification, which we will give evidence upon, this power of attorney says in these words: That he authorized Mr. Mestre "to do all things necessary in the judgment of my said attorney and to obtain my release from all liability as one of the contractors in connection with the said loan and water works." Mr. Mestre says that by virtue of the power of attorney he signs for Mr. Runkle, showing that he acted for Mr. Runkle. The contract is dated Aug. —, 1884, and the power of attorney June 25th, 1884, two months prior to the contract.

The COURT: Can you show anything that authorized Mr. Mestre to make that contract?

Mr. LAWRENCE: He was authorized to do all things necessary in his judgment to obtain Mr. Runkle's release from liability connected with the water works. (Counsel read the contract.) Here is the power of attorney that is in evidence giving him power to release Mr. Runkle from liability. Here is the contract that he executed, reciting that he executed it under that power. I pro-
35 pose to show by Martinez' testimony that in order to release Mr. Runkle from the liabilities that he was under in connection with those contracts it was that this contract was executed by Mr. Mestre. In other words, that by virtue of his power of attorney he, in his judgment, executed this in order to release Mr. Runkle from liability, and I will show by Mr. Martinez that it was this that did release Mr. Runkle. I take it that these two papers in connection with Mr. Martinez' testimony will show our case.

Mr. WALLIS: It is probably unfortunate that my learned friend is trying his case wrong end foremost. Your honor will recollect that this power of attorney authorizes Mr. Mestre to release Mr. Runkle from liability; that is all. It is to release him from liability. Now, what does this instrument purport to do if it imposes any liability at all? In the first place it don't recite that it is executed under this power of attorney or any other particular power of attorney. There is no evidence that it was executed under this power of attorney. The only evidence is that they both exist. In the next place we find this recital: "This is to certify"—to which I desire to call your honor's attention—"to which I desire*d* to give all the force of a public instrument, that I, Mr. S. J. Burnham," &c. (Counsel read down to the word "draft.") In other words, Mr. Lino Martinez, being indebted to Mr. Burnham in the sum of $83,087.36 upon certain drafts drawn by Mr. Overman upon Maddison & Co., London, has paid Mr. Burnham the sum of $64,000, leaving a balance of $19,000 still due; and this contract is
36 to impose that liability upon Mr. Runkle, and it is intended to impose it through a power of attorney which authorized Mr. Mestre to release Mr. Runkle from all liability in any matter altogether. It don't appear to be connected with this matter at all.

Mr. LAWRENCE: We propose to make it connect.

The COURT: This is the first clear insight I have had into the case.

Mr. LAWRENCE: I will withdraw the offer of the contract of August 4th at present, and let Mr. Martinez testify about it.

The COURT: This is founded on an account stated?

Mr. LAWRENCE: Yes, sir.

LINO MARTINEZ (direct examination continued):

Q. Where do you reside?

A. Havana.

Q. Are you acquainted with the defendant in this suit, Mr. Runkle? That gentleman there?

A. Yes, sir; very well.

Q. You are also acquainted with José Manuel Mestre?

A. Yes, sir; very well.

Q. Do you remember of the occasion of a contract for the erection of water works in the city of Havana, in which Mr. Runkle became interested?

A. In which Mr. Runkle became what?

Q. Interested?

A. Oh, yes, sir; very well.

Q. Did you raise some money to be deposited as guarantee
37 on account of that contract?

A. Yes, sir; I must explain that.

Q. From whom did you raise the money?

A. From Mr. Burnham.

Q. For whom did you raise it?

A. For Mr. Runkle and his other parties, and if you will let me explain two words there——

Q. One moment; I will give you an opportunity. From whom did — raise the money?

A. In fact from Mr. Burnham.

Q. Mr. Burnham, whose name was mentioned here in the papers this morning?

A. Yes, sir; the same name.

Q. You knew Mr. Burnham?

A. Yes, sir; very well.

Q. In what way did you raise that money?

A. I have to explain thoroughly.

Q. Go on in your own way.

A. I was spoken to by Mr. Runkle——

Objected to.

A. When I went here in New York to the office of Mr. Olcott, where I met Mr. Runkle.

Q. When was that?

A. Something like Nov. or Dec., 1881, he agreed with me to go down to——

Q. State what was said by Mr. Runkle.

A. I only tell the history of how he raised the money;
38 he agreed——

Objected to.

The COURT: State substantially what was said.

A. He prayed me to go to Havana and try to get for him the contract for the loan and water works of the city of Havana; one of the conditions published by the official paper in the place to present before that any proposition——

Objected to.

The COURT: He can state that there was a contract, there was a proposal issued for building these water works, and it was in relation to that that Mr. Runkle spoke to you and gave you instructions?

A. One of the conditions.

Q. What did he authorize you to do?

A. To obtain a contract for him and the other parties, Mr. Gilson, Mr. Maddison, and Mr. Lyle; previous to that it was necessary to obtain a deposit of $64,000; they have not money to make the previous deposit, so that the contract will be conferred to them. This Mr. Gilson who was acting in Havana and who signed all the documents acted for Mr. Runkle.

Mr. WALLIS: There is no evidence of that.

A. He accepted the whole thing, and he came and said——

Objected to what Mr. Gilson said.

A. —that a deposit of $64,000 was to be made and the money was not there; then I was asked——

(By Mr. WALLIS:)

Q. Who by?

39 A. Mr. Gilson; I had a contract afterwards.

Q. A written contract?

A. Yes, sir.

Q. Where is it?

(By Mr. LAWRENCE:)

Q. Do you refer to the one you have just examined?

A. Yes, sir.

Mr. LAWRENCE: I will offer that.

The COURT: Let me see if I understand it. Proposals were issued by the government of Havana for the organization of certain water works?

A. Yes, sir.

Q. Mr. Runkle with some other- was trying to get that contract?

A. Yes, sir.

Q. Or was he going to take it alone?

A. No, sir; three other parties were to take it with him

Q. Then it was necessary that they should make a deposit?

A. Yes, sir.

Q. It required a deposit of $64,000?

A. Yes, sir.

Q. And Mr. Runkle hadn't the money and he employed you to raise that money?

A. Yes, sir.

Q. And you raised it from Mr. Burnham?

A. Yes, sir.

Mr. WALLIS: Under a written contract?

A. As I understood it, it was this way: Mr. Overman, one party representing Mr. Maddison, as there were four gentlemen
40 contracting in this business, Mr. Runkle, Gilson, Lyle, and Maddison, of London. In Havana Mr. Gilson was acting for Mr. Runkle—I understood that—and Mr. Overman was acting for Mr. Maddison.

Mr. WALLIS: There is no authority for that.

A. When the moment arrived to make the deposit Mr. Overman wanted to sell some drafts against Maddison, of London, and then I had to get the money from Mr. Burnham and make the deposit and obtain the contract.

(By the COURT:)

Q. Was Mr. Burnham responsible for the whole amount of that money, the $64,000?

A. I was responsible myself.

Q. And then you became responsible to Burnham for that amount?

A. Yes, sir.

Q. And you deposited it as a guarantee?

A. Yes, sir.

(Further direct:)

Q. Now, then, just explain how this sum of $83,000 referred to in the contract was made up.

Objected to.

The COURT: We have got to show, of course, why Mr. Martinez had this money of Mr. Burnham's. He was acting in the interest of Mr. Runkle in taking that money. Mr. Runkle, of course, became responsible to you?

A. Yes, sir.

Mr. WALLIS: That was under a written contract.

Q. Now, we want to see how Mr. Runkle became responsible.

A. I was responsible to Mr. Burnham for that amount.

41 Q. How did Mr. Runkle become responsible to Mr. Burnham?

A. Mr. Runkle became responsible to Mr. Burnham by that last contract that was read here.

Q. The contract that you translated?

A. Yes, sir.

Q. So it all depends on that?

A. Yes, sir.

Mr. LAWRENCE: I want to show how this $19,000 was made up; that it was the interest and protest fees and drafts and expenses of that sort incurred in raising the $64,000; so that Mr. Martinez owed that to Mr. Burnham; *so that Mr. Martinez owed that to Mr. Burnham;* instead of $64,000 he owed him $83,000.

Mr. WALLIS: I don't see that it makes any difference how — Mr. Martinez owed Mr. Burnham.

The COURT: Not without he is going to prove how Mr. Runkle became responsible.

Q. How is that $19,000 made up?

A. It is a long history to tell that. The representative of Mr. Maddison, who was in Havana at the time of the contract, proposed——

Q. Show how the $19,000 was made up as briefly as you can. Just state the transaction.

A. I will only state the history. The drafts on London, where I raised the money, were guaranteed by me, and when I arrived in London the contracts were not paid, the drafts were pro-
42 tested, and they raised money, and they had several expenses, and that money is represented in this $19,000; this $19,000 is represented by protest and interest incurred by the said drafts.

Q. Was there an account made up of that betwee- you and Mr. Burnham?

A. Yes, sir; certainly.

Q. (Showing witness a paper.) Is that the account?

A. Yes, sir; a copy of the account.

(By Mr. WALLIS:)

Q. Was that account made up between you and Mr. Burnham in Spanish or English?

A. It was made, as far as I recollect, in Spanish, although Mr. Burnham is an Englishman. I don't remember whether it was Spanish or English, but I think Spanish.

Objected to this copy.

(Further direct:)

Q. You recollect the amount?

A. Yes, sir.

Q. Then, using that paper to refresh your memory, tell the amount.

Objected to on the ground that it is not the account made up between them; it cannot be a copy, because it was made up in Spanish.

Mr. LAWRENCE: Have you the original?

Mr. WALLIS: Yes, sir; I have and produce it.

Q. (Showing witness the original account.) Do you remember that?

A. Yes, sir; that is the one.

Q. That is the account stated between you and Mr. Burnham?
A. Yes, sir.
43 Q. What is the balance due there?
A. $19,087.36.
Q. Was that the amount agreed to between you and him?
A. Yes, sir.
Q. Will you read the account to the court?

Objected to on the ground that it has no bearing against Mr. Runkle. Objection overruled. Exception prayed and allowed.

Q. Translate that account.
A. (The witness did so, and read it in English to the court.)
Q. This contract for the erection of the water works was not carried out?
A. No, sir.
Q. And was there a settlement effected between you and Mr. Mestre on the part of Mr. Runkle at the time the contract was rescinded? And I present the paper that has already been offered—the contract—simply to identify it.

Objected to.

Q. There was a settlement between you and Mr. Mestre on behalf of Mr. Runkle?

Objected to; there is no such evidence. Objection overruled. Exception prayed and allowed.

Q. What was required by you of Mr. Mestre in order to obtain a rescission of the contract with the city authorities?

Objected to for the same reason.

The COURT: In case Mr. Runkle did not finish that he was to forfeit $64,000?
Mr. LAWRENCE: Yes, sir.
44 Q. Was that so?
Mr. WALLIS: No, sir.
Q. Was there any effort to obtain Mr. Runkle's release from the $64,000 forfeiture?
A. Yes, sir.
Q. What was done by him?
A. By me?
Q. At whose request?
A. Mr. Mestre.
Q. Did you impose any conditions, if so, what, with Mr. Mestre before you would give your services to secure that release?

Objected to.

(By the COURT:

Q. Did you know that Mr. Mestre was acting as the representative of Mr. Runkle?
A. Yes, sir.

Q. How did you know it?

A. Mr. Mestre told me every step that he moved; that he was consulting with New York in everything.

Mr. WALLIS: Now, then, is Mr. Runkle to be charged with the conditions imposed by this witness when acting between himself and Mr. Mestre in Havana, when Mr. Runkle was not there, and the only authority that the witness knew that Mr. Mestre was representing Mr. Runkle was Mr. Mestre's say so, and when the authority produced in court gives no authority to incur any obligations of any kind, and when this witness is taking off a liability of $20,000 and putting it on Mr. Runkle's shoulders, and when the party with whom he negotiated and said he made these conditions is dead?

The COURT: Is Mr. Mestre dead?

Mr. WALLIS: Yes, sir. Now, under the circumstances, it seems to me that he is stretching the rules of evidence that they break.

The COURT: I will hear what he says.

Mr. WALLIS: Then the objection is overruled and we pray an exception. (Exception granted.)

Q. The question is, did you impose any conditions upon giving your services to secure a re-cission of that contract with the city authorities?

Objected to on the ground that whatever his arrangement, if this written contract is the contract—whatever arrangement Mr. Martinez made *are* merged in that contract and he must abide by it.

The COURT: There is no question about that; you must abide by it; you cannot go outside.

Mr. LAWRENCE: I am simply showing this: The power of attorney says that he can release from liability, and I am showing now that he did release from liability.

Mr. WALLIS: The contract will show that itself.

The COURT: You cannot go outside of the contract.

Mr. WALLIS: It appears now that this was an indebtedness of Mr. Martinez to Mr. Burnham, and they propose to show an acceptance by Mr. Runkle's agent, as they say; he made an agreement to assume that debt; that is their position. Well, now, under the statute of frauds no contract to assume or pay the debt of another can be upheld unless it is in writing, and if Mr. Runkle had made that alleged contract himself he could not be held unless it was in writing. You are trying to prove a verbal condition accepted by Mr. Mestre outside.

Objection overruled. Exception prayed and allowed.

Q. What did you require to be done on the part of Mr. Mestre for Mr. Runkle in connection with this $19,000? What did you require that Mr. Mestre should do in order to get your influence with the city authorities?

A. Only to settle with Mr. Burnham; that is all I asked, and I asked for several months for that.

Q. To settle that $19,000 with Mr. Burnham?
A. Yes, sir; that is the only thing.
Q. And that you did insist upon with Mr. Mestre?
A. If I insisted with Mestre to do that?
Q. Yes.
A. Yes, sir; it was a condition I told him.
Q. This contract that has been referred to, do you know what Mr. Mestre did with it before it was signed?
A. Yes, sir.

(By Mr. WALLIS:)

Q. How do you know?
A. I was attending to every step at every moment.
Q. You saw what he did with it?
A. I tell you how. When we agreed to relieve Mr. Runkle of all responsibility——

(Further direct:)

Q. What responsibility do you mean?
47 A. Of course in the municipality, as all claims against the contractor.
Q. For damages for non-performance?
A. Certainly, and to keep the deposit and go against the contractor. When we agreed on a basis to settle this matter with Mr. Burnham and to devote all my time and attention to relieving that contractor to annul/ the contract, we went together to Mr. Mestre, myself and Mr. Burnham, and we made a project of agreement, and then Mr. Mestre said, I don't want to do anything unless I consult with the parties in New York: give me sufficient time to consult these New York parties.
Q. Who are the New York parties?
A. Mr. Alcott and Mr. Runkle.
Q. What did he send to New York?
A. The draft of the agreement. Then he sent that to New York. I went several times to Mr. Mestre and asked him, Have you any reply from New York? He said, No, but I expect it every moment. A few days afterwards he had a letter in his hand, and said, Here is the reply from New York. We can go there and sign the agreement now. Then we went to Mr. Mestre and I to Mr. Burnham and signed the agreement.
Q. Is that the agreement that you have been shown and translated here?
A. Yes, sir.
Q. Do you know that the agreement was rescinded?
A. With the municipality?
Q. Yes.
48 A. Certainly, in the most ample way.
Q. And Mr. Runkle was released from all liability?
A. Yes, sir; from all responsibility for that to the city of Havana.
Q. Did you obtain the $64,000 guarantee from the city?
A. Yes, sir; which amount was given to Mr. Burnham.

Q. If you had not obtained that, would Mr. Runkle have been responsible to you for it?

A. He would have been responsible.

Objected to on the ground that the witness is testifying to a legal conclusion. Objection overruled. Exception prayed and allowed.

Cross-examination (by Mr. WALLS):

Q. You are yourself liable to Mr. Burnham, are you not, in case Mr. Runkle does not pay this $19,000 and interest?

A. I am responsible for it, of course, as the total amount.

Q. And this Mr. Mestre that you have testified about as having had talks with is dead, is he not?

A. Yes, sir.

Q. And did Mr. Mestre ever show you any powers of attorney from Mr. Runkle—written documents?

A. You have it there.

Q. Did he show you any others?

A. I don't remember.

Q. Didn't he show you one in the Spanish language?

A. I don't remember whether he did or not.

Q. Didn't he have several papers there?

A. Mr. Mestre?

49 Q. Yes.

A. I think so. I don't remember that point. I never went into his papers.

Q. Didn't you yourself telegraph to New York to have further orders of different powers sent from Mr. Runkle?

A. Yes, sir. I have written a letter or I telegraphed; I am not sure which.

Q. Don't you know whether he received a power of attorney in answer to your cablegram?

A. I don't understand you.

Q. Didn'd Mr. Mestre or you, in answer to these dispatches or letters that you say you sent to New York, receive authorization from Mr. Runkle?

A. At the last moment I think a power of attorney was sent to Mr. Mestre and myself for the final act of signing——

Q. Never mind what you did not see.

A. I think it was it.

Q. It was in Spanish?

A. Yes, sir; I think it was. I can't swear to that, but I think it was, or it was translated there; I don't remember.

Q. (Handing witness two letters.) Are those your letters?

A. I guess so.

Letters offered in evidence and marked D 1 and D 2 for identification.

Q. (Handing witness three letters.) Are those your letters?

A. Yes, sir; I think so.

Offered for identification and marked D 3, D 4, and D 5.

50 Q. You say you met Mr. Runkle in 1881 in Mr. Alcott's office. How often have you seen him since then?

A. Then I saw him several times; after I came back from Havana, after they obtained the contract: I saw him after—I think it was April or May, 1882; I saw him two or three times, I don't remember, and since that time I never saw him again that I can recollect.

Q. (Handing witness a paper.) Is this a telegram sent by you or in connection with Mr. Mestre to Mr. Alcott?

A. It might be sent by Mr. Mestre.

Q. Was it sent with your authority?

A. I can't swear to that.

Q. You have no recollection of it?

A. I know several communications between Mr. Mestre and, maybe this is in consequence of one of our interviews, but I don't remember.

Q. You think you sent several like these?

A. I know I paid it.

Q. Several telegrams in that style?

A. Telegrams or letters.

Q. This is signed Mestre—Martinez?

A. I remember several communications of that kind, but I don't remember this one.

Q. (Handing witness two papers.) Do you recognize that as one of those you have spoken of?

A. He told me that he was going to send something of that kind; it was Mr. Mestre's communication.

51 Q. (Handing witness two papers.) Do you recognize that as one of them?

A. That is one or the other one; there are several communications; he said he was going to telegraph, and I have confidence that he sent them.

Four telegrams offered for identification and marked D 6, D 7, D 8, and D 9.

(By the COURT:)

Q. Who were they sent to?

A. Mr. Alcott.

Q. Mr. Alcott was the attorney of Mr. Runkel?

A. Yes, sir.

Further cross:

Q. (Handing witness paper.) Do you recognize that as a copy of the contract entered into between you and Mr. Runkle and these other parties in relation to this account that you spoke of?

A. I think that is a translation of the agreement.

Q. That you executed in Havana?

A. Yes, sir.

Offered in evidence and marked Exhibit D 10.

Q. (Handing witness another paper.) Is this paper the contract entered into between you and Mr. Runkle?

Objected to, as the contract is under seal.

Q. Was that made between you and Mr. Runkle?

A. I must read it.

Q. Well, we will prove it by Mr. Alcott. What do you know about these several expenses which you say made up this item of $19,000; do you know anything further than that they
52 were presented to you by Mr. Burnham?

A. Of course.

Q. That is all you know about them?

A. Yes, sir; that is all I know.

Q. Do you know whether that account that is set forth came to the notice of Mr. Runkle personally?

A. (Not answered.)

Q. Did you ever see Mr. Runkle have it?

A. Oh, no; I never did; I can't know that.

Mr. LAWRENCE: Mr. Runkle has produced it.

Mr. WALLIS: No; his attorney has.

Q. You say, Mr. Martinez, that before the execution of this paper that has been read and you translated that you had a conversation and talk with Mr. Mestre in relation to this $19,000, and that you then made it a condition of your getting this $64,000 that Mr. Mestre should obligate Mr. Runkle to assume that $19,000 of indebtedness; that was an agreement then made between you and Mr. Mestre?

A. The basis of which——

Q. Answer my question. That was a contract then made between you and Mr. Mestre?

A. That was a verbal agreement.

Q. These meetings with Mr. Runkle that you speak of in the fall of 1881 at Mr. Alcott's office; who was present at those meetings?

A. Well, there was——

Q. Was Mr. Alcott present?

A. Yes, sir; I think so; I think he was there sometimes.

53 Q. Do you know whether Mr. Alcott is familiar with the Spanish language?

A. Yes, sir.

Q. Is he competent to translate it into English?

A. I think so.

Q. As competent as you are yourself?

A. To translate from Spanish into English?

Q. Yes.

A. I think he is authority for that; I think he can translate.

Redirect (by Mr. LAWRENCE):

Q. I show the witness a writing, which is annexed to the contract that I offered in evidence, a writing in the Spanish language, and ask him whether he knows the signature of Antonio Pares.

A. Yes, sir.

Q. As subscribing witness?

A. Yes, sir.

(By Mr. WALLIS:)

Q. Did you ever see him write?
A. Yes, sir; I saw him write and sign it.

(Further redirect:)

Q. He is a resident of Cuba?
A. Yes, sir.
Q. Is he in Cuba now?
A. Yes, sir.
Q. Will you translate that instrument?
A. "I transfer to Mr. Francisco G. Mediovilla all the rights and actions that correspond to me according to this document, subrogating him in my place and grade in consideration of having
54 received of the said gentleman the aforesaid balance of $19,087.36 in gold, but on the condition that Mr. Santiago J. Burnham is always pledged to sell the shares on reference on the order of Mr. Runkle, as has been stated, and deliver to the latter the remainder of the product of the sale of the said shares.
Havana, March 20th, 1885.
Signed by G. B. Gomez, Cond' Zabaret y Pares.
As witness, Frederico Majae, Antonio Pais."

MR. LAWRENCE: I offer the contracts and the assignment in evidence. The assignment I don't regard as necessary for me. Mr. Burnham is the legal plaintiff and is entitled to prosecute the action to judgment. Still as the paper is here I think it is proper to offer it.

Mr. WALLIS: I renew all the objections I have made to the original contract, viz., that it is not executed by Mr. Runkle, but by Mestre, and it has not been shown that Mestre had power to execute such a contract in Runkle's name.

The COURT: I can't stop to examine the papers now. I will admit it subject to exception.

Mr. WALLIS: Then I object to the assignment on the ground that it is not contained in the plaintiff's bill of particulars, as is required by the statute of this State, and that therefore the plaintiff cannot introduce it in evidence. I refer to sec. 236 of the practice act.

The COURT: I will admit it to subject to exception.

Mr. LAWRENCE: I only offer this because it is connected with the contract. Mr. Burnham is the legal plaintiff. Besides that your honor will find upon an examination of our practice that we are not bound to give them a copy of all papers of that sort.
55 Still my reliance is upon the fact that we are not bound to prove it.

Plaintiff rests.

Mr. WALLIS: I move for judgment on the plaintiff's case. The thing rests simply here. Conceding everything that they have proved; conceding that they have a right to put in this parol testimony in regard to a written document; conceding that they have proved the assignment, what does it all amount to? It amounts

simply to this, that Mr. Lino Martinez was indebted to Mr. Burnham in the sum of $64,000 for money advanced by Mr. Burnham to enable Mr. Martinez to make a deposit with the municipality of Havana to enable Mr. Runkle and his associates to obtain a contract from that city for the erection of water works. That money was advanced and the deposit was made under this contract of March, 1882.

Mr. LAWRENCE: I object to counsel using that contract; he put it in evidence himself on cross-examination.

Mr. WALLIS: The substance is that Mr. Martinez deposited the $64,000, and that these gentlemen together, not Mr. Runkle alone, but Mr. Runkle and Mr. Gilson and Mr. Lyle, undertook to return to Mr. Martinez the $64,000. They did not agree to pay any interest or anything else, and a special provision was made in this contract, accepted by Mr. Martinez, to secure him for the interest, namely, a specific assignment of $25,000 in gold.

Mr. LAWRENCE: We may as well understand whether the court thinks it is proper practice that that should be a part of my
56 case. If so, then before you go on with your motion I want to examine Mr. Martinez on that agreement.

The COURT: It is a little irregular to introduce it for the motion to nonsuit.

Mr. WALLIS: Mr. Martinez testified that it was under a written contract. Now, instead of asking that it provided so and so, I simply introduced the written contract itself. So that under the terms of the agreement, upon the faith of which Mr. Martinez deposited his $64,000, Mr. Runkle and his associates undertook to pay back the exact amount of the deposit, which has been done, and Mr. Martinez accepted this arrangement of a promise of $25,000 in gold to reimburse him for the interest. Now, that is the agreement as it is stated between Martinez and his associates.

The COURT. Has the $25,000 been paid?

Mr. WALLIS: No, sir; it was to come out of the proceeds of the contract. Mr. Martinez understood, your honor will notice, that this $25,000 is more than the amount of the interest, but was specified in view of their assigning him that large sum to take his chances of getting that rather than have any agreement with them for paying the interest.

The COURT: Do I understand that the gist of the contract is to assign Mr. Martinez $25,000?

Mr. WALLIS: That was the agreement, to pay $25,000 out of the proceeds of this contract that they were about entering into. Mr. Martinez having accepted this sum that he expected to get in lieu of the interest, he has no claim for interest outside of that
57 sum. There is no contract upon the part of Mr. Runkle and his associates to pay any interest upon this $64,000.

The COURT: What is the date of that contract?

Mr. WALLIS: March 27th, 1882.

The COURT: Then his interest depends upon the successful carrying out of that contract?

Mr. WALLIS: Yes, sir.

The COURT: You can hardly expect me to decide this off-hand on a motion to nonsuit. Have you any testimony?

Mr. WALLIS: Very little. There was no obligation, Mr. Runkle having paid back the $64,000 which Mr. Martinez had deposited. There was no obligation upon the part of Mr. Runkle or his associates to pay him anything more unless it arises under this instrument. Leaving this out, they stood quits. Now, the power of attorney was a power to collect and receive property due to Mr. Runkle and to do these other things as incident to them. Does that purport to collect, release, or receive anything due to Mr. Runkle?

The COURT: Don't it say release?

Mr. WALLIS: Yes, sir; but it was incident; it was to collect and receive money and property due to Mr. Runkle in the city of Havana. There is no authority to Mestre to make Runkle responsible for a single thing. There is no authority to enter into a contract with anybody, except one for the recovery of property, and of course any details that are incident to that, but it was to recover property from the city or from other parties, and as incident
58 to that to do these other things. If he acted under that power of attorney—we say he did not, but that is the only one in proof—what did he do? Did he collect any property? Did he receipt for any property? No. All he did was to impose a liability upon Mr. Runkle that did not exist, for he, Mr. Runkle, was not responsible for it, and put Mr. Runkle in Mr. Martinez' position as a debtor to Burnham. But my learned friend says this is all very well; this had to do with this water contract. Is there any evidence in the case to show what that water contract was or what it had to do with the case? The only evidence is not that it had to do with the water contract, but that it had to do with the $64,000 out of the municipality of Havana, and for that Mr. Runkle was not responsible after the principal was paid under this contract put in evidence.

Now, then, what is this alleged contract of Aug. 4th? There is not one word in it by which Mr. Runkle assumes or agrees to pay anybody a penny. (Counsel read it to the court.) It is an option to Mr. Runkle to pay this, raise the stock and pay the $19,000, if he wanted to. Your honor will remember that this stock was deposited with Burnham by Maddison & Co. as security for these expenses; therefore the expenses became a lien upon them, and under this contract Runkle was the assignee of Maddison & Co., so that Runkle became entitled to that stock, subject to Burnham's claim, subject to the pledge. There is not a word there to impose any liability on Mr.
59 Runkle. He was not under obligation to any man to pay a single penny other than the face of the $64,000. Mr. Mestre had no authority to impose such an obligation, and Mr. Mestre, as a lawyer, did not do it. Mr. Mestre, as a lawyer, not knowing how Mr. Runkle, *Burnham*, would feel under this stock, provided that Mr. Runkle might take it all up and pay the amount for which it was pledged, as he might have done without any contract, because, being Maddison's assignee, he might have done it.

Mr. LAWRENCE: If counsel is permitted to make use of the contract he offered on cross-examination, I am entitled to examine my witness, Mr. Martinez, on the question of that contract.

The COURT: You might have examined the witness on that subject, but you allowed the opportunity to pass and closed your testimony.

Mr. LAWRENCE: He offered it as his testimony, the testimony of the defendant, and when it comes to my time in rebuttal I propose to rebut it. But now he puts in a part of his testimony to rest his motion on, and I wish to rebut that on the point that he has asserted that it contains an agreement to pay $25,000 to cover interest on this other amount, and I want to prove by Mr. Martinez that he has never received a cent of that.

Mr. WALLIS: We will admit that if you want to.

The COURT: I don't see what difference it makes.

Mr. LAWRENCE: I only allude to that, as counsel seems to throw some weight upon the agreement; that it provides a
60 special way of paying the interest. I want to show that the interest has not been paid.

The COURT: They admit that.

(Further remarks were then made on the motion to nonsuit. The court reserved decision and directed the defendant to put in whatever testimony he desired.)

The account stated was offered and marked B 1.

The contract was marked Ex. B 2.

The power of attorney was marked B 3.

DANIEL RUNKLE, the defendant, being called and sworn in his own behalf, testified as follows:

Direct examination.

(By Mr. WALLIS:)

Q. You live at Asbury, in this State?

A. Yes, sir.

Q. Are you the defendant in this action?

A. Yes, sir.

Q. I show you Exhibit B 1. Did you ever see that paper before?

A. No, sir.

Q. Did you ever see any like that?

A. No, sir.

Q. Has any account stated like that been handed to you?

A. No, sir.

Q. That is all.

Not cross-examined.

EMMIT B. OLCOTT, produced and sworn on the part of the
61 defendant, being duly sworn according to law, testified as follows:

Direct examination (by Mr. WALLIS):

Q. Where do you live?
A. New York city.
Q. What is your business?
A. Lawyer.
Q. Do you know the parties to this action?
A. I do. I know Mr. Burnham; I know Mr. Runkle and Mr. Martinez.
Q. I show the witness paper bearing date Nov. 2nd, 1881, purporting to be made between Daniel Runkle and Lino Martinez. Is that your signature, Mr. Alcott?
A. Yes, sir.
Q. Did you see the parties named in this paper execute it?
A. Yes, sir.
Q. And at the time you signed your name as subscribing witness?
A. Yes, sir.

Offered in evidence and marked Exhibit 11*d*.

Q. I show you B 3. Have you ever seen that paper before?
A. Yes, sir; I have.
Q. What is that?
A. A power of attorney; I drew it.
Q. Do you know whether that paper was ever used or acted under?
A. To my knowledge it never was.
62 Q. Do you know whether subsequent to the execution of that paper powers of attorney were executed by Mr. Runkle to Mr. Mestre in relation to the matter therein referred to?
A. There was.
Q. Where?
A. In the city of New York.
Q. What was done with them?
A. Sent to Mr. Mestre, in Havana.
Q. What language are these subsequent powers of attorney in?
A. Spanish.
Q. Are you familiar with the Spanish language?
A. Yes, sir: although I am an American.
Q. I show you these telegrams, which have been marked for identification D 6, D 7, D 8, and D 9, and ask you whether you received those telegrams.
A. I did.
Q. In due course?
A. Yes, sir.
Q. From the cable office in New York?
A. I did.
Q. Did you reply to them?
A. I did.

Q. Will you translate that Spanish one?

Objected to. Question withdrawn.

Q. To whom did you address the reply to this telegram?
A. To Mr. Mestre.
Q. Did you get an acknowledgement to them?
A. I did.

63 Telegrams offered in evidence. Objected to on the ground that they have not been properly proved.

The court stated that he was not prepared to admit the testimony, but would hold it under advisement. Exception was prayed by defendant's counsel and allowed.

The telegram in Spanish was heretofore offered in evidence and marked D 12.

Q. Will you translate that telegram, which has been admitted?
A. "I urge forward pending powers; I protest against damages; delay. Martinez."
Q. That is to you?
A. To my care, to Runkle, Lyle, Gilson, &c.
Q. What is the date of that?
A. March 7th, 1884.
Q. These other telegrams bear date in July?
A. Yes, sir.
Q. Did you, acting for Mr. Runkle, the defendant here, at the time you transmitted these subsequent powers of attorney that you spoke of to Mr. Mestre, send with them any letters of instruction in relation to it?
A. I did.
Q. In the first place, I would ask you whether the powers of attorney that you spoke of, written in the Spanish language, whether you received any acknowledgment of them from Mr. Mestre.
A. Yes, sir; I did.

Q. Have you the letter of instruction sent to Mr. Mestre,
64 accompanying them?

The COURT: That is subsequent to the power of attorney that is in evidence?

Mr. WALLIS: Yes, sir.

A. Yes, sir.
Q. Have you a copy of the letter?
A. Yes, sir.
Q. Read it.

Objected to unless it is shown to have some connection with this case.

Q. What is the date of the letter?
A. What is the date of the other power of attorney?
Q. June 24th, 1884.
A. With that power of attorney, June 25th, 1884, instructions were sent and a power in Spanish also went. The instructions with

that power are as follows: My letter is dated June 25th; it went with that power in evidence.

Q. That is a letter from you?

A. Yes, sir; I want to call your attention——

Mr. LAWRENCE: Is a letter from Mr. Olcott competent?

The COURT: I don't think it is.

Mr. WALLIS: Mr. Olcott, as proved by my friend here, was Mr. Runkle's representative in this matter and it is not shown that this power of attorney which was put in evidence was brought to the attention of any parties to this transaction. Mr. Martinez never saw it; it is one of the means by which the authority is said to have been and is unquestionably imposed upon Mr. Mestre, but
65 not the only one. I offer in evidence this letter, written by Mr. Olcott, as representing Mr. Runkle, to Mr. Mestre, in Havana, as evidence of Mr. Mestre's authority in the premises, and that it accompanied Ex. B 3.

The court overruled the offer and allowed defendant's counsel an exception.

Q. Do you remember Mr. Runkle himself preparing and forwarding a letter to Mr. Mestre?

A. I do.

Q. Do you know that that letter was sent?

A. I do.

Q. Do you remember seeing an acknowledgement of it?

A. I do.

Q. Is that a copy of it?

A. Yes, sir, it is; it is in my handwriting.

Q. Who was it signed by?

A. By Mr. Runkle, in my presence.

Q. Read it.

A. Witness did so.

Said letter was then offered in evidence and marked B 13.

Q. Do you know who are the owners of this Churnwood Forest stock?

A. Yes, sir.

Q. Who are they?

A. Of course, I was not present at the transaction, but I understood from Mr. Gilson——

Objected to.

Q. Did you ever hear from Mr. Burnham in regard to it?
66 A. Yes, sir.

Q. What did you hear from him?

A. I don't know from any knowledge, but I knew from Mr. Burnham that this Churnwood Forest stock had been given by Maddison for Maddison & Co. to his London house—that is to say, the London branch of Mr. Burnham's firm or his agents in London—as a collateral for the payment of the drafts that had been delivered in Havana. Overman, the representative of Maddison & Co., had

under the obligation they had of providing these securities under their part of the Havana water-works contract. I say as collateral, for those drafts which were taken up by Burnham on the liability or responsibility of Martinez, forwarded to London to Baring Brothers, the representatives of Burnham, and not paid, protested for non-payment; that afterwards that stock was delivered by Maddison as security for the non-protested drafts.

Q. Did you ever see Mr. Burnham after the execution of this contract of Aug. 4th?

A. Yes, sir; I think he was a client of mine.

Q. Did you ever see him in relation to this matter?

A. Yes, sir; after the execution of this paper of August 4th.

Q. What took place?

A. I had an interview with Mr. Burnham in New York city on the 22nd day of Aug., 1884, and I refresh my memory from the fact that I wrote a letter to Mr. Mestre immediately thereafter, narrating the conversation I had with Mr. Burnham that day.

67 Q. State what that conversation was.

A. Mr. Burnham said that he had come to confer as to the sale of the Churnwood Forest stock. I told Mr. Burnham that Mr. Runkle had given me full instructions——

Mr. LAWRENCE: Here is a conversation with the plaintiff some three weeks after the last incident that has been given in evidence, after the contract. It is competent to effect the terms of the contract in any way.

Mr. WALLIS: If the contract is ambiguous you can put in testimony to show what is means; in other words, it is to show an ambiguity of the contract.

The COURT: I will rule that out.

Exception prayed and allowed.

The COURT: If there is anything to show that the contract was revoked it would be competent.

The WITNESS: No, sir; it is a conversation between Mr. Burnham and me. On the 4th of Aug. there was a paper signed by Mr. Burnham in which he speaks——

The COURT: I don't think you ought to testify as to that.

Mr. WALLIS: Burnham is the plaintiff here. I suppose a party to the contract and a party to the action can state that he had no claim upon them and never could have; that is what we are going to show.

The COURT: That is another thing.

Mr. LAWRENCE: Of course Mr. Burnham did not have any claim against them; he assigned his interest to another man.

The COURT: Does he say why he assigned his claim? Let us hear the whole thing.

68 The WITNESS: Mr. Burnham stated that he had come to confer as to the sale of the Churnwood Forrest stock; I told Mr. Burnham that Mr. Runkle had given me full instructions in the matter and that there was no necessity of seeing Mr. Runkle;

Mr. Burnham said, Does Mr. Runkle desire to take up the shares of stock? My answer was No. Does Mr. Runkle wish the stock sold? said he. My reply was, Mr. Runkle does not assume any liability at all, but there would seem to be no objection to the sale of the stock. Suppose, returned Mr. Burnham, the stock does not bring enough to pay me my balance, is Mr. Runkle to pay me any part of the difference? Mr. Runkle, I replied, does not consider himself obligated to assume the payment of the difference in any way; he simply acted as he did for the purpose of facilitating the return to Mr. Martinez of the $64,000 deposited, and his only demand was that if there should be a surplus over the amount you would be entitled to it should, in equity, be given to him to reimburse him for his outlay.

The COURT: Given to Runkle or Martinez?

A. To Runkle. Mr. Burnham thereupon observed that Mr. Martinez is the one to make good to me the difference. Yes, so I understand, was my reply. Mr. Burnham said that Maddison had given him absolute power to sell the stock for any sum that he might choose and that he would go to London in the next ten days and see his correspondents, Baring Brothers, and have them give him the name of some good broker through whom he could sell the stock for the best price he could get.

69 Mr. LAWRENCE: I don't object to that.

The COURT: Very well; it is in, then.

Q. Have you made it your business to familiarize yourself with the laws of Cuba?

A. Yes, sir; I have.

Q. Do you practice there?

A. Yes, sir; I have familiarized myself with the practice of law as practised there.

Q. What is the law in Cuba in relation to the execution of assignments?

Objected to, as witness is not a practitioner and an expert.

The COURT: No; that won't do.

Q. What is the law in Cuba in relation to the execution of assignments? By whom must such instruments be executed to make them valid?

Objected to on the ground that he is not an expert in the Spanish law.

The COURT: That won't do; you must have some gentleman here who is a member of the bar in Cuba.

Q. What does your business consist of in New York?

A. We have a specialty of the practice of law in foreign countries. We have an office in the city of Havana and in Mexico city. We represent the Spanish government—its consul in New York; the Mexican government—its consul in New York—and various other potentates throughout the world.

Q. Have you studied Spanish law?

A. I have; yes, sir.
70 Q. Are you familiar with the practice in Spanish courts?
A. Yes, sir.
Q. In all matters relating to contracts?
A. Yes, sir.
Mr. LAWRENCE: In what Spanish court have you practised?
A. I beg your pardon; I did not say that; I told the judge expressly that I did not practis- in the courts.
Q. Now, I repeat my question: What is the law in Cuba in relation to the execution of assignments—by whom must such instruments be executed to make them valid?

Objected to. Overruled. Exception prayed and allowed.

Q. Is there any book recognized as an authority containing the law upon this subject upon which I have enquired?
A. Yes, sir.
Q. What is the name of the book?
A. The Civil Code, by Escriche, and the regular books relating to notarial papers.
Q. What is the meaning of that word?
A. It is the name of a glossarist.

The last question and answer are objected to on the ground that they are expressions of opinions.
Counsel moved to strike them from the record.
Motion granted and the testimony was ordered stricken from the record. Exception prayed and allowed.

Mr. WALLIS: I offer these books in evidence as to the Spanish law.

Q. Have you made a translation of the contract of Aug. 4th, 1884?
A. I have.
71 Q. And that translation that you have made is correct?
A. It is.
Q. Is that a correct translation as altered?
A. It is, yes, sir.

Contract referred to offered in evidence and marked Exhibit D 14.

Q. That is all.

Not cross-examined.
Defendant rests.

LINO MARTINEZ, recalled in rebuttal, testified further as follows:

Direct examination (by Mr. LAWRENCE):

Q. I show you a copy of a letter from Daniel Runkle to José Mestre, dated New York, July 31, 1884. Was the original of that letter ever shown to you?
A. No, sir.

Q. Did Mr. Mestre ever say anything to you that he had received such a letter?

A. No, sir.

Q. Containing any such instructions as that?

A. No, sir.

Q. How long does it take in ordinary course of the mail for a letter to go from New York city to Havana?

A. Before they had the Tampa route it always take four days and four and a half—that is, before they have the steamers from Tampa.

Q. How long did it take in July, 1884?

72 A. Four or four and a half days.

Cross examination (by Mr. WALLIS):

Q. Did Mr. Mestre ever show you any of these letters or power of attorney in relation to this?

A. No.

Plaintiff rests.

Rest all.

(It was agreed to submit the case on briefs.)

73 United States Circuit Court, District of New Jersey.

SANTIAGO J. BURNHAM, Who Sues for the Use of Francisco G. Mediavilla, *vs.* DANIEL RUNKLE. } In Assumpsit.

The following is a bill of particulars of the demand on which the declaration in the above-stated cause is founded:

The sum of nineteen thousand and eighty-seven dollars and thirty-six cents, with interest thereon at nine per cent. per annum from August 4th, 1884, due and owing at said date from the defendant to Santiago J. Burnham on an account stated between them at that time and afterwards assigned to Francisco G. Mediavilla. Said account stated is evidence by a writing in the Spanish language, of which the annexed is a truly translated copy.

Dated Feb'y 10th, 1886.

Yours, etc. BABBITT & LAWRENCE,
Att'ys of Pl'ff.

To Wallis & Edwards, att'ys of def't.

74 Be it known by these presents, to which I desire to give all the force of a public document, that I, Mr. S. J. Burnham, having received from Mr. Lino Martinez the sum of sixty-four thousand dollars in gold on account of the sum of eighty-three thousand eighty-seven dollars and thirty-six cents ($83,087.36) found to be due me by the account this day presented to Mr. Lino Martinez in reference to drafts drawn on the 24th of March, 1882, by Mr. H. J. Overman upon Mr. E. C. Madison, of London, and endorsed to my order by said Mr. Lino Martinez, which were protested for non-

payment and in due course protected by Messrs. Baring Brothers & Co., of London, representing Messrs. J. C. Burnham & Co., have agreed with respect to the balance of $19,087.36, which still remain unpaid, as follows:

Recognizing, as I hereby recognize, Mr. Daniel Runkel as assignee of Mr. Walter H. Gilson, who in his turn was assignee of Mr. E. C. Maddison, for himself and for the firm of Messrs. Maddison & Co., I obligate myself to hold at the disposal of said Mr. Runkel the shares of the Charnwood Forest Railway Company, of the nominal value of 14,000 pounds sterling, which the said Messrs. Maddison & Co. deposited with me and transferred to me as guarantee for the reimbursement of the amount of the above-mentioned drafts and the expenses and interest appurtenant thereto as soon as the said balance of $19,087.36 shall have been paid me by the said Mr. Runkel, which must be done within the term of three months from this date, it being his privilege to make such payment directly or to require the said shares so deposited to be sold under such instructions as he may give, or such portion thereof as may be necessary for the repayment of said balance of $19,087.36, which sum being paid the remaining shares will remain at the free disposal of Mr. Runkel as well as any balance in cash which may remain on the partial sales of such shares.

75

The sum due will bear interest at 9 per cent. per annum until its complete payment.

Dr. Don Jose Manuel Mestre, as attorney-in-fact of Mr. Daniel Runkel, subscribes the present stipulation as a pledge of his assent thereto in the name of his constituent.

And, to the end that these presents may have their due effect, three are made of one tenor and signed, one for each party, at Havana, on the 4th of August, 1884.

NOTE.—In the act of signing Mr. S. J. Burnham declares that he assigns and transfers to Mr. Candido Zabarte y Paris all his claims and rights of action which may belong to him under the foregoing instrument, subrogating him in his place and stead, in consideration of having received from him the aforesaid balance of $19,087.36, the said Burnham remaining, however, under the obligation to sell the shares of stock referred to upon the order of Mr. Runkel, as hereinabove explained, and to deliver to Mr. Runkel the residue of the proceeds of the sale and the remaining shares.

Dated as above.

(Signed) S. J. BURNHAM.
JOSE MANUEL MESTRE.
CANDIDO ZABARTE Y PARIS.
L. MARTINEZ.

As witnesses:
E. CORCULLUELA.
ANTONIO PAIS.

76 CITY AND COUNTY OF NEW YORK, *ss:*

C. V. Lowenfels, being duly sworn, deposes and says that he is in the office of Coudert Brothers, counsellors-at-law, in this city; that he is familiar with the Spanish and English language and accustomed to translate the same; that he has carefully translated the Spanish document of which this is a translation, and that the within is a true and faithful translation of the same and of every part thereof.

C. V. LOWENFELS.

Sworn and subscribed to before me this 8th day of February, 1886.

JNO. W. LEWIS,
Notary Public, K., N. Y. Co.

Endorsed: United States circuit court, district of New Jersey. Santiago J. Burnham, who sues, etc., *vs.* Daniel Runkle. Bill of particulars. Babbitt & Lawrence, att'ys. Due and legal service of the within bill of particulars is hereby admitted. Defendant is to plead within thirty days. Wallis & Edwards, att'ys of def't. Filed October 16, 1893. S. D. Oliphant, clerk.

77 UNITED STATES OF AMERICA, }
District of New Jersey, } *ss:*

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true, and complete copy of the "examination of defendant before trial at the instance of the plaintiff," the "testimony," and the "bill of particulars" in the suit of Santiago J. Burnham, who sues for the use of Francisco G. Medsavilla, against Daniel Runkle as the same remain on file in my office.

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

In testimony whereof I hereto set my hand and affix the seal of said court, at Trenton, in said district, this seventeenth day of October, A. D. 1893.

S. D. OLIPHANT, *Clerk.*

Endorsed: Case No. 14,291. Supreme Court U. S., October term, 1893. Term No., 266. Wm. Runkle *et al.*, P. E., *vs.* Santiago J. Burnham, &c. Stipulation and addition to record. Filed Oct. 18, 1893.

Office Supreme Court U. S.
FILED.
JAN 30 1894
JAMES H. McKENNEY,
CLERK.

266

Supreme Court of the United States.

WILLIAM RUNKLE and another, Administrators, &c.,
Plaintiffs in Error,

vs.

SANTIAGO J. BURNHAM, who sues, &c.,
Defendant in Error.

Brief on Behalf of Plaintiffs in Error.

HAMILTON WALLIS,
WILLIAM D. EDWARDS,
Of Counsel with Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Sts., New York.

Supreme Court of the United States.

WILLIAM RUNKLE and HARRY G. RUNKLE, Administrators, &c.,
Plaintiffs in Error,

vs.

SANTIAGO J. BURNHAM, who sues, &c.,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

The writ of error in this case brings up for review the judgment of the Circuit Court of the United States for the District of New Jersey, entered upon a decision of the Honorable LEONARD E. WALES, District Judge, before whom the case was tried without a jury. His decision will be found at page 34, &c., of the record. The original plaintiff in error (the defendant below) was Daniel Runkle, who died while the cause was pending in this Court, and by proper proceedings the present plaintiffs in error, his administrators, have been substituted in his place.

While there is but little dispute about the facts of the case, they have so important a bearing upon the rights of the parties to this litigation as to require a careful consideration and a thorough understanding.

In the year 1882 the City of Havana, in the Island of Cuba, was desirous of procuring the erection of cer-

tain water-works to supply that city with water, and, as incident thereto, a negotiation for a loan to furnish the means for carrying out the enterprise was necessary. The city advertised for proposals both for the loan and the erection of the water-works, and required the successful bidder to deposit in the city treasury the sum of $64,000 in gold coin, as a guarantee for the faithful performance of the contract. Among the bidders for this concession were four gentlemen, namely, Daniel Runkle, Walter C. Gilson, James H. Lyles and C. T. Maddison (pp. 11, 21).

In the latter part of November, 1881, and while the project for the erection of these water-works was pending, an agreement was entered into between Daniel Runkle, of the one part, and one Lino Martinez, of Havana, of the other part (Exhibit D11, p. 27), wherein in was agreed that, in case Runkle should obtain the contract for the waterworks, he would pay to Martinez the sum of $175,000 as a compensation to him for obtaining the contract, and in this respect, and to this extent, Martinez was interested with the other parties in the project for the erection of these water-works and the floating of this loan.

As the result of the bidding before referred to, this contract was awarded to the parties above named, Martinez being, to the extent already indicated, a party in interest in the arrangement. It then became necessary to provide for the deposit of $64,000 in gold, and an agreement in writing was then and there entered into between these different parties (Exhibit D10, p. 24), whereby Martinez assumed the responsibility of making this deposit, and in consideration thereof, Messrs. Gilson, Runkle and Lyles, "as a remuneration and for the payment of interest to Mr. Martinez for the said deposit," assigned and transferred to him a further interest of $25,000 in the proceeds of the contract, payable as the moneys derived from that contract should be realized. The situation, then, was that the original contract was awarded to the par-

ties already stated, including Mr. Runkle, and that in consideration of the second contract, dated March 27, 1882, Martinez had obligated himself to furnish the money necessary to make this deposit. The statement, therefore, of Martinez, on page 21, that Runkle *employed* him to raise this money, and the finding of the Court on page 6, is contradicted by the evidence, for the contract of March 27th (Exhibit D–10) conclusively establishes that there was no employment of Martinez by Runkle in raising this money; that Martinez, in what he did in this matter, did not act as Runkle's agent or employee, but that he was acting in his own interest, pursuant to the terms of a definite contract and for a consideration expressed in that contract.

It seems that Martinez did not have the money himself with which to make this deposit, and, therefore, borrowed the same from Santiago J. Burnham, he himself becoming responsible to Burnham for its repayment (p. 21). Bearing in mind that in this transaction Martinez was acting not, as the trial Court found, in the employ of Runkle, but under a separate contract and as an independent contractor; it is very plain that the borrowing from Burnham of the sum necessary to enable Martinez to fulfil his contract, could impose no liability upon the other parties to that contract. It appears also that, as security for the payment of this $64,000 borrowed by Martinez from Burnham, Martinez pledged to Burnham certain shares of stock of the Charnwood Forest Railroad Company, an English corporation (pp. 12-14). The relation of the parties as to this $64,000, at this time, is well shown by the testimony of Martinez, in which he admits (p. 24) his individual responsibility to Burnham for this loan, with the interest and expenses, and Runkle's responsibility to him for the sum of $64,000 in certain contingencies (pp. 23, 24; p. 26 of addition to record).

What was done in relation to this contract after the steps above referred to does not appear in this record, except that the contract never was fulfilled, and that

in August, 1884, all parties joined in an effort for its rescission, in which efforts Martinez took a prominent part and was deeply interested, because, unless the contract had been rescinded and some arrangement had been reached with the authorities in Havana, the $64,000 on deposit would have been forfeited and Martinez would have been primarily liable for its repayment to Burnham. At this time, Mr. Runkle's representative in the City of Havana was one Jose Manuel Mestre, a Spanish lawyer (since deceased, p. 24), retained by Runkle to protect his interests as an attorney at law (p. 12). Of course, this relation did not confer upon Mestre any right to represent Runkle as his general agent, except in litigation. Recognizing this fact, and for the purpose of clothing Mr. Mestre with authority to represent Runkle in the project of rescinding this contract, a power of attorney, executed in this city by Daniel Runkle, was sent to Mestre. This power is found on pages 16 and 17 of the record and was dated on the 25th day of June, 1884. The instrument itsef is defective in that it recites another document to be thereto annexed and made part of the instrument, and that document is not produced, nor are its contents shown; but the power purports to confer upon Mestre the right to take such proceedings as Mestre should deem best, at law or otherwise, to compound and compromise claims, to give receipts, acquittances and releases, to sign, seal, execute and acknowledge instruments in writing, to appoint lawyers and other agents, executing to them powers of attorney, and to do all things necessary in the judgment of the attorney, to obtain Runkle's "release from all liability as one of the contractors in connection with the said loan and water-works;" and the trial Court has found and based its decision upon the finding that Mestre, in the steps afterwards taken in Havana, was acting under this power of attorney, and that under the authority conferred on him by this power of attorney, he exe-

cuted the contract of August 4th, 1884, which will be hereafter referred to (p. 7).

There is *no* evidence in the case warranting this conclusion. On the contrary, the proof shows conclusively that this power of attorney played no part in the execution of the agreement of August 4th. No witness has testified that Mestre ever acted under this power. Olcott, Mr. Runkle's attorney in this city, testifies (p. 29): "I know that that paper (referring to the power of attorney of June 25th) was never used or acted under," and in this he is corroborated by Martinez, who says (p. 24): "I either wrote or telegraphed to New York to have further or different powers sent from Mr. Runkle." Very plainly, then, the power of June 25th was not sufficient for their purpose. On July 18th he telegraphs Olcott (p. 30): "*The powers received are insufficient.* It is urgent to send by to-morrow's steamer new Spanish power in Spanish for Runkle, Lyles and Gilson, Maddison to Martinez, Mestre confirming the power of March 6th and June 26th, amplifying them specially to cancel the contract to loan, to accept return of deposit, giving common counsel liberty of action, and to execute a general release;" and again, on July 27th, he telegraphs (p. 30): "Send anyhow first steamer power according telegram 18th;" and again he telegraphs July 23d (p. 29): "Telegraph if power is coming to-morrow's steamer." All this makes it too plain for argument that the power of June 25th was insufficient, was repudiated, and another power called for, as testified to by Olcott, and thus demonstrates that the finding of fact of the trial Court upon which it reached the judgment in this action has no evidence to support it. And to corroborate all this, and to prove that in executing the contract of August 4th, the power of June 25th was not relied upon, as Olcott testifies, we have the testimony of Martinez (p. 24): "At the last minute, I think, a power of attorney was sent to Mr. Mestre and myself for the final act of signing. It was in Spanish, I think. I cannot

swear that, but I think it was, or it was translated there; I don't remember." This power of attorney, upon which Mestre acted in signing the contract of August 4th, was not the instrument of June 25th and has not been produced, nor have its contents been proven. But the fact that such a power was necessary, and that it was received and acted on, certainly and effectually negatives the finding of the trial Court: "By virtue of the authority conferred upon him by the aforesaid letter of attorney (of June 25th), Mestre, on the 4th of August, 1884, acting for and in the name of Runkle, entered into an agreement, &c." What authority was conferred upon Mestre we do not know. Certainly, as an attorney at law, he possessed no authority *virtute officii* to impose a liability upon his principal of some $20,000, nor can we assume that any such power existed; it must be affirmatively proved.

The importance of this lack of authority will be manifest when we consider, as we shall now do, the situation of the several parties as between themselves, resulting from this deposit of $64,000. It appears that Burnham raised the money loaned by him to Martinez by the acceptance of certain drafts drawn upon London by the representative of Maddison, who was in Havana, (p. 21) and that these transactions resulted in certain charges for interest, protests, telegrams, stamps, brokerage, etc., etc., making up the alleged balance of $19,087.36 (p. 21). For this, it will be remembered, Runkle was in no wise responsible. Under his contract with Martinez, he had undertaken to repay the original sum of $64,000 to Martinez, without interest, if it should become forfeited to the City of Havana, and, to reimburse Martinez for these very expenses, Runkle and others agreed to give, and Martinez agreed to accept, a further interest in the contract with the City of Havana, to the amount of $25,000 in gold, which was then and there assigned to him. Martinez, for his reimbursement, assumed the chance of the completion of the contract and undertook to look solely to

the proceeds of that contract for his repayment, and Runkle was in no wise responsible to him for anything in excess of the $64,000, unless and until he had realized from the Havana contract. As between Martinez and Burnham, Martinez was certainly indebted to the latter for all these expenses, but there was no relation whatever between Burnham and Runkle. All parties understood this, because Martinez testifies (p. 21): "Mr. Runkle became responsible to Mr. Burnham *by that last contract that was read here*, the contract that I translated; *it all depends on that.*" And Burnham, in his interview with Mr. Olcott, never claimed any right to recover from Runkle (p. 31). This, then, was the situation of the parties on the 4th day of August, 1884, the date when the contract with the City of Havana was rescinded. Martinez owed Burnham some $83,000, made up of the $64,000 which he had borrowed, with expenses and interest. Runkle owed Martinez the sum of $64,000, if Martinez should fail to recover it from the City of Havana, but owed Burnham nothing. And Martinez, for his own interest, and Mestre, in the interest of Runkle, were busying themselves to obtain the rescission of the contract for the water-works, which had been entered into more than two years before.

In the month of June previous, as has been already shown, Mestre had received from Runkle the power of attorney, which was plainly insufficient for the purposes contemplated, and under which both he and Martinez declined to act, and demanded from Runkle a further power of attorney to enable them to procure the deposit from the City of Havana, as the result of the rescission of this contract. These powers of attorney were prepared in New York (p. 29), and about the same time a letter of instructions was sent by Runkle to Mestre, dated July 31, 1884 (Exhibit D, 13, p. 31), in which Runkle says: "I see no objection to the manner of settling the Habanna water-works contract, as shown in the draft of the proposed memorandum to be signed at the time of payment and return of the

$64,000, except that either in the said paper or some other I would like it to be stated that the balance claimed by Mr. J. C. Burnham or his firm, is against Mr. Luis Martinez and the Charnwood Forest stock, *and in no event against me individually;* and, also, that should the Charnwood Forest stock, on a sale, not bring the $18,000 claimed by Mr. J. C. Burnham and his firm, *there shall be no claim against me individually, or otherwise, for any difference.*" The trial Court says (p. 8), "that there is no proof that Mestre received notice of the revocation of the letter (of attorney) of June 25th, before he signed the agreement with Burnham." There is no evidence to support this conclusion, and in reaching it the Court has entirely overlooked the only evidence upon the subject contained in the record which is to the contrary. In the first place, as has already been shown, this power of attorney of June 25th was absolutely insufficient for the purpose, and neither the rescission nor the return of the $64,000 could have been accomplished under it. The testimony of Martinez and his telegrams above referred to make it plain beyond the possibility of a question that further and different powers of attorney were essential to carrying out their plans; and those powers, as has been already shown, were sent; and instead of being in English, as is the power of June 25th, they were in Spanish. When these were sent is conclusively shown by the testimony of Martinez. The contract in question was executed August 4th, 1884. Martinez testifies (p. 34) that in the ordinary course of mail in July, 1884, it took a letter four or four and a half days to reach Havana from New York. On page 24 he testifies: "*At the last minute*, I think, a power of attorney was sent to Mr. Mestre and myself for the final act of signing. It was in Spanish, I think." This new power of attorney, then, reached Havana on the 4th day of August, 1884, and must, therefore, have been mailed from New York on the 30th or 31st day of July previous. But it is

possible to fix the date of this transaction still closer. The letter from Runkle to Mestre is dated July 31st, 1884, and, according to Martinez's testimony, had just time to reach Havana by the 4th of August. But Martinez swears (p. 23), "A few days afterwards he (Mestre) had a *letter* in his hands, and said, 'Here is the reply from New York. We can go there and sign the agreement now.' Then Mr. Mestre and I went to Mr. Burnham and signed the agreement—that is, the agreement I have been shown and translated here. The agreement with the municipality was rescinded in the most ample way, and Mr. Runkle was released from all responsibility for that to the City of Havana. I obtained the sixty-four thousand dollar guarantee from the city, which amount was given to Mr. Burnham." So that, on the very day when this agreement was signed—August 4th—Mestre received not only an additional power of attorney—as testified at page 24—but also a letter. Now, there is no evidence in the case of any other letter that could possibly have reached Mestre at the time specified, except the letter of July 31st, 1884 (Exhibit D-13), which letter, as Martinez shows, could have been received by Mestre upon that day. The proof, then, would seem to be conclusive that there was ample and uncontradicted evidence to show a revocation of the power of June 25th, and that on the very day when the final contract was signed, Mestre received not only new powers of attorney which have not been proven, but also the letter of July 31st, in and by which his power was expressly limited, so that he had no authority to incur any responsibility whatever on the part of Mr Runkle. It is not to be presumed, in the absence of all evidence, that the power of attorney and letter received August 4th by Mestre were radically different, and the conclusion is then natural and inevitable that this last power conferred no authority upon Mestre to incur any new liability in behalf of Runkle, and this conclusion is confirmed by plaintiff's failing to produce and prove

it. There can certainly be no presumption that Runkle conferred an authority in the power of attorney which he expressly revoked in a letter sent at the same time. True, Martinez testifies (p. 33) that this letter was never shown to him, but he also says that Mestre never showed him anything about having received such a letter as that (p. 34). In this he expressly contradicts his own testimony, on page 23, where he says that on the day the contract was signed, Mestre had a letter in his hands which he said was the reply from New York, and that thereupon they went and signed the contract. But it is of no consequence whether Martinez saw this letter or not. The contract is between Burnham and Runkle. Burnham was dealing with Runkle's special agent, and the question of fact is, what was the extent of that agent's authority? Certainly, whatever else may have been true, as a matter of fact, he had no authority to impose any liability upon Mr. Runkle. Under these circumstances, and at this time, the contract of August 4th was executed by the parties. This contract is in the Spanish language, and two translations of the part in question here are in the proofs—one on the part of the plaintiff, the other on the part of the defendant. The plaintiff's translation is found on page 19, and is as follows: "On the part of Mr. Burnham (this translation was made in open court by plaintiff's witness Martinez, and no question as to its accuracy was raised by either party): "Recognizing, as I recognize, that Mr. Daniel Runkle, assignee of Mr. Walter Gilson, who, at this time, was assignee of Mr. C. T. Maddison by himself, by the name of Maddison & Co., I pledge myself *to put at the disposal of the said Runkle* the shares of the company of the Charnwood Forest Railway Company, of the nominal value of fourteen thousand pounds sterling, that this Maddison & Co., above mentioned, had deposited in my power, and have been transferred to me as guarantee; and the payment of the amount of the above-mentioned pounds of sterling

and of the expenses and interest corresponding, as soon as the said balance will be paid to me of $19,-087.36 by the above-mentioned Mr. Runkle, which ought to be done in three months' time, beginning from this date, *and will be at his discretion* to do this directly or well to dispose that the said shares deposited should be sold according to the instrument that he will give him, the amount that it should be necessary for the repayment of the said balance of $19,085.36, and when this will be covered the shares will remain to the entire disposition of Mr. Runkle, just the same as any amount in gold that may result from the partial sale of the said shares. The amount owed will have an interest of nine per cent. by the year until the complete payment. Mr. Jose Manuel Mestre, as attorney of Mr. Daniel Runkle, subscribes the present agreement as proof of his conformity in the name of his constituency, and will have all the due effect." The similar part of this instrument, translated for and offered by the defendant, is as follows: "Recognizing, as I recognize, Mr. Daniel Runkle as the assignee of Mr. Walter H. Gilson, who in his turn was the assignee of Mr. C. F. Maddison, for himself and for the firm of Maddison & Company, I bind myself *to place at the disposal of said Mr. Runkle* the shares of the Charnwood Forest Railway Company of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison & Company deposited in my hand and transferred to me as guarantee for the reimbursement of the amount of the aforesaid drafts, and the expenses and interest relating thereto, *as soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle,* which is to be done within the period of three months, counting from the date hereof, *it being left to his discretion either to do so directly or to direct that of the said shares deposited there to be sold* (in accordance with such instruments that for such purpose he may give) such portion as may be necessary for the reimbursement of such bal-

ance of $19,085.36, which being covered, the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares. *The sum owing* shall carry interest at nine per cent. per annum until its complete payment. Mr. Jose Manuel Mestre, as the attorney in fact of Mr. Runkle, subscribes this present stipulation by way of assent in the name of his principal."

It has been shown plainly that up to the point of the signing of this instrument Mr. Runkle was under no obligation whatever to Mr. Burnham on account of the $64,000, or anything growing out of it, and this unquestionably was the understanding of Martinez, for he testifies (p. 21) that the responsibility of Runkle to Burnham rested solely upon this instrument.

What was the meaning of this instrument?

While to a large extent this is a question of construction by the court, it must still be governed by the construction put upon it by both of the parties thereto. And the record furnishes that construction. Runkle says (p. 13): "Q. Was it communicated to you at Mr. Burnham's request that you should take up these securities? A. That he had taken the stock, *and that I had the privilege of redeeming it if I wished to*, which I did not wish to do." On page 31 of the record we find Burnham's construction of this instrument. It appears that he called upon Mr. Olcott, August 22, 1884, and as to what took place there the testimony is uncontradicted. "Mr. Burnham stated that he had come to confer as to the sale of the Charnwood Forest stock. Mr. Burnham said, 'Does Mr. Runkle desire to take up the shares of stock?' My answer was 'No.' Then he said, 'Does Mr. Runkle wish the stock sold?' My answer was 'Mr. Runkle does not assume any liability at all, but there would seem to be no objection to a sale of the stock.' 'Suppose,' returned Mr. Burnham, 'the stock does not bring enough to pay me my balance. Is Mr. Runkle

to pay me any part of the difference?' 'Mr. Runkle,' I replied, 'does not consider himself obligated to assume the payment of the difference in any way; he simply acted as he did for the purpose of facilitating the return to Mr. Martinez of the $64,000 deposited, and his only demand was that, if there should be a surplus over the amount you would be entitled to, it should in equity be given to him to reimburse him for his outlay.' Mr. Burnham thereupon observed that 'Mr. Martinez is the one to make good to me the difference.'"

Specification of Errors.

1. That the Court, upon the trial of this cause, refused to find and decide, according to law and the facts of the case, "that it does not appear that Mestre had any authority to assume an obligation on the part of the defendant" (Record, p. 34).

2. That the Court, upon the trial of this cause, refused to find and decide, according to law and the facts of the case, "that the contract of August 4th, 1884, does not impose any liability upon the defendant" (Record, p. 34).

3. That the Court which tried this cause found and decided, contrary to law and the facts of the case, that the plaintiff was entitled to judgment against the defendant for the sum of twenty-eight thousand one hundred and fifty-seven $\frac{82}{100}$ dollars (Record, p. 37).

4. That the Court which tried this cause did not find and decide according to law and the facts of the case, that the defendant was entitled to judgment herein against said plaintiff and for his costs in this action.

5. That the Court admitted in evidence upon the

trial of this cause, contrary to law, a certain account stated between Lino Martinez and S. C. Burnham & Co., notwithstanding the objection of the defendant thereto (Record, p. 22).

6. That the Court admitted in evidence upon the trial of this cause, contrary to law, a certain parol agreement made between one Jose Mestre and Lino Martinez, notwithstanding the objection of defendant thereto (Record, p. 23).

7. That the said Court refused to admit in evidence three certain telegrams signed by Mestre and Martinez, and marked for identification Exhibits D6, D7, D8 and D9 (Record, pp. 29, 30).

8. That the Court, upon the trial of this cause, refused to direct judgment for defendant upon the plaintiff's case as requested (Record, p. 26).

ARGUMENT.

POINT I. The contract of August 4th, 1884, imposed no liability upon the defendants' intestate, Daniel Runkle.

It is conceded that no liability of Runkle existed outside of that contract. Plaintiff's only witness so states (p. 21), where he says: "Mr. Runkle became responsible to Mr. Burnham by that last contract that was read here—the contract that I translated. *It all depends on that.*" Again, the plaintiff by his bill of particulars (Addition to Record, p. 40) pleads that contract as the foundation of his claim. Besides, it appears by uncontradicted evidence that the only obliga-

tion assumed by Runkle was the repayment of the $64,000 deposited by Martinez with the City of Havana without interest, all other expenses connected with that deposit, including interest thereon, being provided for by the agreement of March 27th, 1882 (Exhibit D 10, p. 24). It is the well-settled rule that interest will not be allowed in case of a contract not providing for it in terms, except as damages for its breach *(Redfield vs. Ystalyfera Co., 110 U. S., 174)*. But here the parties had contracted for a different compensation than interest in case of the breach of the contract, which arrangement Martinez had fully accepted. The fact that the thing which Martinez had taken afterwards became worthless cannot change the rights and liabilities of the parties. If the agreement was that Runkle should give Martinez certain shares of stock instead of interest, and Martinez had accepted the shares, he could not hold the stock and recover the interest, and the position would not be at all changed if the stock should become worthless. So, here, Martinez agreed to accept, and did accept, an interest in Runkle's contract with the City of Havana in lieu of all claim for interest upon the deposit. This he did by an express contract. If Runkle's contract with the City of Havana had been carried out, certainly Martinez could not have recovered his interest under that contract and interest upon the amount of the deposit, nor would he be in a position to demand interest upon the deposit at all ; but it can make no difference in the rights of the parties that the contract between Runkle and the city afterwards became worthless.

As to the other items of this account which it is sought to charge against Runkle, there can be no pretense of any liability. Martinez undertook by contract to furnish this $64,000, and the expense he was put to in furnishing it can give him no sort of claim against Runkle. The error into which the trial Court was led on this branch of the case was in concluding that Martinez was *employed* by Runkle to obtain the amount

of this deposit for him, of which there is not a word of proof, and in ignoring Exhibit D10, page 24, whereby Martinez assumed for himself the duty of supplying this deposit as a contract obligation resting upon him. Of course, then, Runkle could in nowise become responsible in the first instance for expenses incurred by Martinez in the performance of his contract, so that every item which goes to make up this original charge of $19,087.36 was something for which, before the execution of the contract of August 4th, 1884, Runkle was in nowise responsible to Burnham or to any other person and, the $64,000 having been repaid, Runkle was discharged of all responsibility.

But Runkle never became, before the execution of the contract of August 4th, responsible for any part of this alleged indebtedness.

To understand the situation of the parties in relation to it, it is necessary to refer to the agreement, Exhibit D-10, page 24, which was executed by Martinez.

By this agreement Martinez deposits of *his capital* with the City of Havana the sum of $64,000, and the undertaking on the part of Runkle is as follows: "To deliver the above-named sum to Mr. Martinez at any time he may ask for the same if it should be demanded by the municipality in consequence of their not having carried out the contracts for the waterworks or for any cause that the municipality might retain said deposit."

And then the contract goes on to assign to Martinez $25,000, in gold, to be paid out of the proceeds of the contract with Havana, at a rate therein specified, which assignment is stated to be "a renumeration for the payment of interest to Mr. Martinez for the said deposit."

This makes the situation of the parties in relation to this deposit very plain.

Martinez had himself undertaken for a valuable consideration to make the deposit from his own capital, and, of course, there could be no obligation upon

the other parties to this contract for any expense which Martinez may have been put to in raising this amount of money which he had undertaken himself to deposit. It was a matter of entire indifference whether he was required to incur expense for that purpose or not, for he had obligated himself to make the deposit. So that there was no claim against Runkle for any of the expenses which go to make up the principal sum of $19,000. Nor, as we have already shown, was there any claim for any interest that Martinez may have been required to pay. Certainly, if he had used his own capital, as was contemplated under the terms of this contract, he could collect no interest; and the fact that he was obliged to borrow the money from another and obligate himself to pay interest to his creditor, did not alter the situation.

None of these things, then, imposed any responsibility upon Runkle. Under the express terms of this contract, no responsibility could arise against Runkle except on the happening of one contingency, namely, if at any time the $64,000 was demanded by the municipality, or if the municipality had retained the sum, then Runkle would have been responsible to repay the amount to Martinez upon demand, and, of course, would have been liable for interest in case of non-payment after demand.

But this contingency never arose. The municipality did not retain this sum. On the other hand, the municipality repaid the amount when demanded (p. 23), and Martinez with it paid his debt to Burnham, except this balance of $19,000, interest and expenses. So that the time never came when Martinez had a right to demand this principal sum from Runkle. But, if he had no right to demand the principal, much less did he ever have any right to demand any interest or any expenses resulting from his efforts to obtain the principal.

So that at the time of the execution of this contract of August 4th the situation of the parties was this: Martinez had obtained from the City of Havana the

$64,000 which he had deposited pursuant to his contract, and with that sum had paid the principal of his indebtedness to Burnham. Burnham still had a claim against Martinez for $19,087.36, for which Runkle was in no wise liable either to Burnham or Martinez, and could not be made liable, unless that result was accomplished by this contract under consideration.

But it is said Runkle has made himself responsible, under this contract of August 4th, 1884, for this balance of $19,087.36, and that the contract was executed by Runkle in consideration of Martinez's services in obtaining a rescission by the City of Havana of its contract with Runkle, and thus releasing the $64,000 for which Runkle was responsible. Waiving, for the sake of argument, all question as to whether this contract of August 4th, 1884, was the contract of Daniel Runkle, this brings us to the consideration of two questions:

FIRST. Was there any consideration for this contract of August 4th? In other words, did Runkle gain anything, or did Burnham part with anything, upon the face of it?

The contract is not under seal, and, therefore, beyond question, the consideration is open to investigation.

Burnham certainly lost nothing, for Martinez testifies (p. 24): "I am myself responsible to Mr. Burnham in case Mr. Runkle does not pay this $19,000 and interest;" and Burnham states (p. 32) "that Mr. Martinez is the one to make good to me the difference."

But it is said that Runkle obtained his rescission of the contract with Havana for the construction of the water-works and his release from liability thereunder. But that was not obtained *as the result of this contract of August 4th*, because the August 4th contract recites that *at the time it was executed* the contract had already been rescinded, and the $64,000 which was deposited repaid to Martinez and Martinez had paid it over to

Burnham. So that the rescission of the Runkle contract could have been no part of the consideration of this contract of August 4th.

But Martinez says that before he made the contract of August 4th he had a conversation with Mestre, in which he had made it a condition of the rescission of the contract that Runkle should assume this $19,000 (p. 25).

Literally this cannot be true, because he had nothing to do with the rescission of the Havana contract. He was neither the City of Havana nor an officer thereof.

But he says (p. 23): "When we agreed on a basis to settle this matter with Mr. Burnham, and to devote all my time and attention to relieving that contract to annul the contract."

In other words, that he undertook, in consideration of this agreement, to use his efforts to bring about a rescission of the original contract.

But there are two complete answers to this; one is that it is not so stated in the contract, and we cannot bring in parol evidence to supplement the terms of this written instrument. The other is that it nowhere appears in the record that Mr. Martinez did anything whatever towards the rescission of this Runkle contract.

True, the Court says (p. 9) that "Martinez exerted himself to obtain from the authorities of Havana the release of Runkle." But there is no word of evidence in the case to justify that conclusion. Martinez nowhere states that he did anything to obtain such release except when he says that he went and signed this agreement (p. 23). But the finding of a fact by a trial Court which is not supported by any evidence is an error of law *(Parks vs. Ross, 11 Howard, 373; Jones vs. Randolph, 104 U. S., 110).*

In whatever view then we look at this question, there was no consideration to support this contract.

SECOND. The contract itself, unless by the terms of that instrument, Runkle became indebted to Burnham,

there is no foundation for this action. It becomes, then, important to carefully consider the terms of this instrument and the fair interpretation to be put upon it. The original document was in the Spanish tongue, and two translations have been made, one on the part of the plaintiff, and one on the part of the defendant, which differ somewhat in the words used. The translation on the part of the plaintiff is found on page 19, and begins with the recital by Burnham that he *had received* $64,000 in gold on account of $83,085.36, which resulted in his favor on an account then presented to Lino Martinez, which account is found on page 22. Then he states that he (Burnham) had agreed in regard to the balance still owing, as follows: "Recognizing, as I recognize, that Mr. Daniel Runkle, assignee of Mr. Walter Gilson, who at his time was assignee of Mr. C. T. Maddison, by himself, by the name of Maddison & Company, I pledge myself *to put at the disposal of the said Runkle*, the shares of the company of the Charnwood Forest Railway Company of the nominal value of fourteen thousand pounds sterling *that this Maddison & Co. above mentioned had deposited in my power, and have been transferred to me as guarantee:* and the payment of the amount of the above-mentioned pounds of sterling, and of the expenses and interest corresponding, as soon as the said balance will be paid to me of $19,087.36 by the above-mentioned Mr. Runkle—which ought to be done in three months' time, beginning from this date, *and will be at his discretion*—to do this directly or well to dispose that the said shares deposited shall be sold according to the instrument that he will give him the amount that it should be necessary for the repayment of the said balance of $19,085.36, *and when this will be covered the shares will remain to the entire disposition of Mr. Runkle*, just the same as any amount in gold that may result from the partial sale of the said shares. The amount owed will have an interest of nine per cent. by the year until the complete payment." Certainly there is nothing in this instrument which can

be construed as a promise on the part of Runkle to pay this balance, for which he was in no wise responsible. In express terms it provides that the payment of this balance by Runkle will be *at his discretion*, and there is nothing found in it by which Runkle ever assumed or agreed to pay the balance, or made himself in any wise liable therefor. The use of the word "owed" can raise no such presumption, because in the first part of the instrument it is expressly stated that Martinez was indebted to Burnham in this amount, and this word clearly refers to that indebtedness, and fixes the rate of interest upon it.

Taking, now, the translation of the same contract as made for the defendant, the one which the trial Court seems to have adopted. It is found on pages 32 and 33, and recites, as in the former instrument, the receipt by Burnham from Martinez of $64,000 on account of $83,085.36, which results in his favor from an account presented by him to Martinez, and that the balance of $19,085.36, still remains unpaid, and then proceeds: "Recognizing, as I recognize, Mr. Daniel Runkle as the assignee of Walter H. Gilson, who in his turn was the assignee of Mr. C. F. Maddison, for himself and for the firm of Maddison and Company, I bind myself *to place at the disposal of said Mr. Runkle* the shares of the Charnwood Forest Railway Company of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison and Company deposited in my hand and transferred to me as guarantee for the reimbursement of the amount of the aforesaid drafts and the expenses and interest relating thereto, so soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which is to be done within the period of three months, counting from the date hereof, *it being left to his discretion either to do so directly or to direct that of the said shares deposited there to be sold* (in accordance with such instruments that for such purpose he may give), such portion as may be necessary for the reimbursement of such balance of

$19,085.36, which being covered, the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares. The sum owing shall carry interest at nine per cent. per annum until its complete payment." In this translation, also, we find no promise on the part of Runkle to pay this indebtedness due from Martinez to Burnham; we find no assumption of that indebtedness, and nothing that can be tortured into an agreement on Runkle's part to become responsible for it in any way. Here, as in the other translation, the word "owing" clearly refers to the indebtedness due from Martinez to Burnham upon the account stated between them. So far from imposing any liability upon Runkle, the arrangement expressly says *that it is left to his discretion* either to pay the balance and take the stock or to have the stock sold, Runkle to receive any balance that might remain; and this provision is explained by the proof that Runkle had incurred and paid certain other obligations for which he ought, in fairness, to be compensated (p. 32).

The situation of the parties, then, was this: Martinez was indebted to Burnham in upwards of $83,000, which he had borrowed to enable him to carry out his contract with Runkle of March 27th, 1882. Burnham held certain collaterals for the payment of this debt; Runkle had advanced certain moneys which ought to be repaid him; Martinez had recovered the $64,000 from Havana and paid it to Burnham on account of his debt, leaving a balance due Burnham from Martinez of $19,085.36, which, it was agreed, should bear interest at the rate of nine per cent. per annum. It was also agreed that Runkle might, *at his discretion*, pay this balance, and would then be entitled to the stock collateral; or, if he did not so elect, the stock should be sold, and, after the payment of the balance of Martinez's debt, which was the whole interest that Burnham had in the matter, the

balance of the proceeds of the stock should go to Runkle to reimburse him for these other expenditures. The debt was not Runkle's ; the stock was not Runkle's. As testified by Martinez, this instrument is the only ground upon which Runkle can be held responsible, and the plaintiff's bill of particulars (Addition to Record, page 40) expressly limits the plaintiff's claim to this instrument. There is, therefore, no other ground for a recovery except this instrument itself, and unless the instrument can be in some way construed into an agreement on the part of Runkle to assume and pay this debt of Martinez, there is absolutely no foundation for the finding of the trial Court that Runkle became responsible to Martinez for the payment of this balance; or to any one else, and this is clearly the understanding of both of the parties, for Runkle says (p. 13) : " Q. Any other sums of money, if there were any paid or advanced on account of the parties whom he has engaged in these contracts, you were also bound to reimburse, were you not ? A. No, sir. Q. Was it communicated to you at Mr. Burnham's request that you should take up these securities ? A. That he had taken the stock, *and that I had the privilege of redeeming it if I wished to, and which I did not wish to do.* I understood Mr. Olcott to say that Mr. Burnham had called on him and asked me through him to take up this railroad stock that he held ; to take it up and pay him the money for it, which I objected to do." Thus much for Runkle's understanding of the situation. Now for Burnham's.

Mr. Olcott, Runkle's representative in New York, testifies on page 31 to an interview with Burnham, August 22d, 1884, just after the execution of this contract, which is uncontradicted as follows : " Mr. Burnham stated that he had come *to confer as to the sale of the Charnwood Forest stock.* I told Mr. Burnham that Mr. Runkle had given me full instructions in the matter, and that there was no necessity of seeing Mr. Runkle. Mr. Burnham said, ' *Does Mr. Runkle desire to take up*

there is no foundation for this action. It becomes, then, important to carefully consider the terms of this instrument and the fair interpretation to be put upon it. The original document was in the Spanish tongue, and two translations have been made, one on the part of the plaintiff, and one on the part of the defendant, which differ somewhat in the words used. The translation on the part of the plaintiff is found on page 19, and begins with the recital by Burnham that he *had received* $64,000 in gold on account of $83,085.36, which resulted in his favor on an account then presented to Lino Martinez, which account is found on page 22. Then he states that he (Burnham) had agreed in regard to the balance still owing, as follows: "Recognizing, as I recognize, that Mr. Daniel Runkle, assignee of Mr. Walter Gilson, who at his time was assignee of Mr. C. T. Maddison, by himself, by the name of Maddison & Company, I pledge myself *to put at the disposal of the said Runkle*, the shares of the company of the Charnwood Forest Railway Company of the nominal value of fourteen thousand pounds sterling *that this Maddison & Co. above mentioned had deposited in my power, and have been transferred to me as guarantee:* and the payment of the amount of the above-mentioned pounds of sterling, and of the expenses and interest corresponding, as soon as the said balance will be paid to me of $19,087.36 by the above-mentioned Mr. Runkle—which ought to be done in three months' time, beginning from this date, *and will be at his discretion*—to do this directly or well to dispose that the said shares deposited shall be sold according to the instrument that he will give him the amount that it should be necessary for the repayment of the said balance of $19,085.36, *and when this will be covered the shares will remain to the entire disposition of Mr. Runkle*, just the same as any amount in gold that may result from the partial sale of the said shares. The amount owed will have an interest of nine per cent. by the year until the complete payment." Certainly there is nothing in this instrument which can

be construed as a promise on the part of Runkle to pay this balance, for which he was in no wise responsible. In express terms it provides that the payment of this balance by Runkle will be *at his discretion*, and there is nothing found in it by which Runkle ever assumed or agreed to pay the balance, or made himself in any wise liable therefor. The use of the word "owed" can raise no such presumption, because in the first part of the instrument it is expressly stated that Martinez was indebted to Burnham in this amount, and this word clearly refers to that indebtedness, and fixes the rate of interest upon it.

Taking, now, the translation of the same contract as made for the defendant, the one which the trial Court seems to have adopted. It is found on pages 32 and 33, and recites, as in the former instrument, the receipt by Burnham from Martinez of $64,000 on account of $83,085.36, which results in his favor from an account presented by him to Martinez, and that the balance of $19,085.36, still remains unpaid, and then proceeds: "Recognizing, as I recognize, Mr. Daniel Runkle as the assignee of Walter H. Gilson, who in his turn was the assignee of Mr. C. F. Maddison, for himself and for the firm of Maddison and Company, I bind myself *to place at the disposal of said Mr. Runkle* the shares of the Charnwood Forest Railway Company of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison and Company deposited in my hand and transferred to me as guarantee for the reimbursement of the amount of the aforesaid drafts and the expenses and interest relating thereto, so soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which is to be done within the period of three months, counting from the date hereof, *it being left to his discretion either to do so directly or to direct that of the said shares deposited there to be sold* (in accordance with such instruments that for such purpose he may give), such portion as may be necessary for the reimbursement of such balance of

$19,085.36, which being covered, the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares. The sum owing shall carry interest at nine per cent. per annum until its complete payment." In this translation, also, we find no promise on the part of Runkle to pay this indebtedness due from Martinez to Burnham; we find no assumption of that indebtedness, and nothing that can be tortured into an agreement on Runkle's part to become responsible for it in any way. Here, as in the other translation, the word "owing" clearly refers to the indebtedness due from Martinez to Burnham upon the account stated between them. So far from imposing any liability upon Runkle, the arrangement expressly says *that it is left to his discretion* either to pay the balance and take the stock or to have the stock sold, Runkle to receive any balance that might remain; and this provision is explained by the proof that Runkle had incurred and paid certain other obligations for which he ought, in fairness, to be compensated (p. 32).

The situation of the parties, then, was this: Martinez was indebted to Burnham in upwards of $83,000, which he had borrowed to enable him to carry out his contract with Runkle of March 27th, 1882. Burnham held certain collaterals for the payment of this debt; Runkle had advanced certain moneys which ought to be repaid him; Martinez had recovered the $64,000 from Havana and paid it to Burnham on account of his debt, leaving a balance due Burnham from Martinez of $19,085.36, which, it was agreed, should bear interest at the rate of nine per cent. per annum. It was also agreed that Runkle might, *at his discretion*, pay this balance, and would then be entitled to the stock collateral; or, if he did not so elect, the stock should be sold, and, after the payment of the balance of Martinez's debt, which was the whole interest that Burnham had in the matter, the

balance of the proceeds of the stock should go to Runkle to reimburse him for these other expenditures. The debt was not Runkle's ; the stock was not Runkle's. As testified by Martinez, this instrument is the only ground upon which Runkle can be held responsible, and the plaintiff's bill of particulars (Addition to Record, page 40) expressly limits the plaintiff's claim to this instrument. There is, therefore, no other ground for a recovery except this instrument itself, and unless the instrument can be in some way construed into an agreement on the part of Runkle to assume and pay this debt of Martinez, there is absolutely no foundation for the finding of the trial Court that Runkle became responsible to Martinez for the payment of this balance; or to any one else, and this is clearly the understanding of both of the parties, for Runkle says (p. 13) : " Q. Any other sums of money, if there were any paid or advanced on account of the parties whom he has engaged in these contracts, you were also bound to reimburse, were you not ? A. No, sir. Q. Was it communicated to you at Mr. Burnham's request that you should take up these securities ? A. That he had taken the stock, *and that I had the privilege of redeeming it if I wished to, and which I did not wish to do.* I understood Mr. Olcott to say that Mr. Burnham had called on him and asked me through him to take up this railroad stock that he held ; to take it up and pay him the money for it, which I objected to do." Thus much for Runkle's understanding of the situation. Now for Burnham's.

Mr. Olcott, Runkle's representative in New York, testifies on page 31 to an interview with Burnham, August 22d, 1884, just after the execution of this contract, which is uncontradicted as follows : " Mr. Burnham stated that he had come *to confer as to the sale of the Charnwood Forest stock.* I told Mr. Burnham that Mr. Runkle had given me full instructions in the matter, and that there was no necessity of seeing Mr. Runkle. Mr. Burnham said, ' *Does Mr. Runkle desire to take up*

the shares of stock?' My answer was, 'No.' Then he said, '*Does Mr. Runkle wish the stock sold?*' My reply was, 'Mr. Runkle does not assume any liability at all, but there would seem to be no objection to a sale of the stock.' 'Suppose,' returned Mr. Burnham, 'the stock does not bring enough to pay me my balance. Is Mr. Runkle to pay me any part of the difference?' 'Mr. Runkle,' I replied, 'does not consider himself obligated to assume the payment of the difference in any way; he simply acted as he did for the purpose of facilitating the return to Mr. Martinez of the $64,000 deposited, and his only demand was that, if there should be a surplus over the amount you would be entitled to, it should in equity be given to him to reimburse him him for his outlay.' Mr. Burnham thereupon observed that, Mr. Martinez is the one to make good to me the difference.'" This does not sound like a man seeking to recover an amount due him under a written contract.

So we have, assuming this contract to be the contract of Runkle, the following state of affairs. Runkle, before the execution of the contract, was in no wise indebted to Burnham for this balance which was due from Martinez. The contract contained no provision imposing any such liability upon Mr. Runkle. Neither Runkle nor Burnham understood it to impose such a liability. No liability exists unless it is imposed by this contract, and yet the trial Court has found that Runkle became responsible for this payment.

POINT II. The contract of August 4th, 1884, was not Runkle's Contract.

The paper does not purport to be signed by Mr. Runkle but by Mestre, as his attorney, and, therefore, the question of the validity of the instrument as a contract of Runkle's must rest entirely upon the authority of

Mestre. Mestre was not Runkle's general agent in Havana. Nobody pretends that he occupied that position. He was his attorney at law (p. 15), and as such, as was recognized by all parties, had no authority to bind his principal by a contract, except in a lawsuit. Knowing that Mestre possessed no general power to represent Runkle, all parties appreciated the necessity of some special authority to authorize him to act for Runkle in this matter, and for that purpose the power of attorney of June 25th, 1884 (pp. 16 and 17), was executed. The only part of this instrument with which we have anything to do, is the clause which confers upon Mestre the power "to do all things necessary, in the judgment of my said attorney, and to obtain my release from all liability as one of the contractors in connection with the said loan and water-works." And assuming that this was the power under which Mestre acted in executing this instrument, this is the clause under which the trial Court found that Mestre had the right to assume this indebtedness (p. 7). But it no where appears in the record, that the execution of this instrument of August 4th, 1884, was at all necessary for the rescission of the contract between Runkle and Havana. The instrument recites that the contract *had been rescinded* before its execution, because, as stated by Martinez, the $64,000 could not be obtained until the contract had been rescinded, and the instrument of August 4th recites that the money had been obtained and had been paid by Martinez to Burnham; besides, the City of Havana is in no wise a party to this instrument. Therefore, under the terms of this power, it not appearing that the execution of this instrument was necessary for the rescission of the contract between Runkle and the city, no authority was given to Mestre to execute it.

But the finding of the trial Court that this agreement of August 4th was executed by virtue of the power of attorney of June 25th is not only not sup-

ported by any evidence in the case, but is directly contrary to all the evidence. Mr. Olcott, Runkle's New York representative, testifies (p. 29), referring to this power of attorney of June 25th: "*I* KNOW *that that paper was never used or acted under.*" Subsequent to the execution of that paper, other powers of attorney were executed by Mr. Runkle to Mr. Mestre in relation to the matters therein referred to. They were executed in the City of New York, and sent to Mr. Mestre in Havana. These subsequent powers of attorney were in the Spanish language." No one contradicts this statement or claims that Mestre acted under this power of June 25th. Olcott is corroborated in this statement by the telegrams of Mestre himself, as well as Martinez. On July 18th they telegraphed, "*The powers received are insufficient.* It is urgent to send by to-morrow's steamer new Spanish power in Spanish for Runkle, Lyles and Gilson, Maddison to Martinez, Mestre confirming the power of March 6th and June 26th, amplifying them specially to cancel the contract to loan, to accept return of deposit, giving Common Council liberty of action, and to execute a general release, all well explained" (p. 30); and again, on July 23d (p. 29): "Telegraph if power is coming to-morrow's steamer;" and again, July 27th: "Send anyhow first steamer power according telegram 18th." These telegrams make it very plain that the trial Court entirely disregarded the evidence before it when it found that *by virtue of the power of attorney of June 25th* the contract of August 4th was executed, because they expressly state that the power of attorney was insufficient and demanded new ones. Did they receive them? On this point Mr. Martinez testifies as follows (p. 24): "*At the last minute*, I think, a power of attorney was sent to Mr. Mestre and myself for the final act of signing. It was in Spanish, I think. I cannot swear that, but I think it was, or it was translated there." So that, not only was the contract of August 4th not executed under the power of June 25th, but under another

power, which both Martinez and Olcott agree in saying was in the Spanish language, and which was received by Mestre "*at the last minute.*" But no such power has been proved in this case. It needs no citation of authority to show that a subsequent power cancels the prior one, and as it appears that the contract of August 4th was executed by Mestre for Runkle under this subsequent power, forwarded certainly after July 23d, and received *at the last moment* before the contract of August 4th was executed, it is difficult to see what bearing this useless power of June 25th can have upon the controversy. To make this contract of August 4th the contract of Runkle, it was certainly incumbent upon the plaintiff to prove the power of attorney by whose authority Mestre executed it.

But the record discloses still more. As has been already said, Mestre was not the general agent of Runkle, and was not treated as such by the parties to this transaction. He therefore could exercise only such powers as Runkle had granted to him, subject to all limitations which Runkle imposed upon him, and the parties dealing with him were bound to take notice of such limitations upon his powers.

Now, Martinez testifies (p. 23) that he had several times gone to Mestre and asked him if he had any reply from New York, and then says: "A few days afterwards, he had a *letter* in his hands and said, 'Here is the reply from New York. We can go there and sign the agreement *now*.' *Then* Mr. Mestre and I went to Mr. Burnham and *signed the agreement*, that is, the agreement I have been shown and translated here." It thus appears that besides the power of attorney in Spanish which was received at the last minute, there was also received *upon the same day when this contract was executed*, a letter from Runkle, and what that letter was is very clear. Martinez testifies (p. 34), that in the ordinary course of mail in July, 1884, it took a letter four or four and a half days to reach Havana from New York; therefore, a letter mailed in New

York on the 31st of July, could reach Havana on the 4th of August.

Turning now to Exhibit D–13, page 31, we find a letter signed signed by Runkle, dated July 31st, addresed to Mestre and sent to him, and the letter applies directly to this matter, and substantially and decidedly limits the powers of Mestre in relation to it. It provides as follows: "I see no objection to the manner of settling the Havana water-works contract, as shown in the draft of the enclosed memorandum, to be signed at the time of payment and return of the $64,000, except that either in the said paper or some other, I would like it to be stated that the balance claimed by Mr. J. C. Burnham, or his firm, is against Luis Martinez and the Charnwood Forest stock, and in no event against me individually; and, also, that should the Charnwood Forest stock, on a sale, not bring the $18,000 claimed by Mr. J. C. Burnham and his firm, there shall be no claim against me individually or otherwise for any difference." Therefore, not only does the record fail to disclose the authority under which Mestre acted in signing this contract, but, on the contrary, it proves that Mestre was expressly prohibited from entering into any contract which would impose a liability upon Mr. Runkle. If, then, the contract of August 4th does impose such a liability, it is concededly beyond the power of the agent to execute, and is not the contract of the principal; and if it did not impose any such liability, as we understand that it did not, because in express terms it does just what Mr. Runkle's letter said that sould be done, namely, gives Runkle the right to purchase the Charnwood Forest stock, but does not impose any responsibility on him for the debt, of course he is not liable; so that in either case, the plaintiff has no claim against this defendant, and the judgment below was erroneous.

POINT III. The exceptions taken upon the trial were well taken.

Taking these up in the order in which they appear in the specification of errors:

First. An account stated between Burnham and Martinez was admitted in evidence (p. 22).

This is plainly incompetent as against the defendant. He was no party to it and had no knowledge of it (pp. 25 and 26).

Certainly, as to the defendant, it was *res inter alias acta*, and should not have been admitted.

Second. The witness was permitted to testify to the verbal negotiations between himself and Mestre prior to the execution of this contract (p. 23).

These were plainly incompetent, as the contract itself merged all prior negotiations or agreements.

Third. The refusal of the Court to admit in evidence telegrams purporting to have been sent by Mestre and Martinez to Olcott, Runkle's agent in New York, and received by the latter (pp. 28, Addititon to Record, and 29 of Record).

These telegrams were offered simply to show that such communications passed between Mestre and Martinez, and Olcott, Runkle's representative, as tending to prove that the power of attorney of June 25th, 1884, was not the one under which Mestre acted in entering into the contract of August 4th, 1884.

They were certainly competent for that purpose. They were properly proven. As to two of them, the witness Martinez testifies (addition to Record, p. 28): "I remember several communications of that kind" (telegrams signed Mestre-Martinez). "He told me he was going to send something of that kind. * * * That is one or the other one. There were several com-

munications. He said he was going to telegraph, *and I have confidence that he sent them.*"

As to the other, he testifies as follows (addition to Record, p. 28), (being handed the paper): "It might have been sent by Mr. Mestre. I can't swear it was not sent by my authority. I know several communications between Mr. Mestre, and maybe this is in consequence of one of our interviews, but I don't remember. I know I paid it," &c. So much for the sending. Olcott testified (p. 29 of Record) that he received them from Mestre in due course, and replied to them.

Surely this was a sufficient identification of these papers. They were both competent and material, and defendant was entitled to have them in evidence.

POINT IV. The judgment should be reversed.

HAMILTON WALLIS,
WILLIAM D. EDWARDS,
Of Counsel with Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
FEB 24 1894
JAMES H. McKENNEY,
CLERK.

Livingston Middleditch Co., 149 to 153 Leonard St. Telephone Cortlandt 253

UNITED STATES SUPREME COURT.

WILLIAM RUNKLE and another, Administrators of DANIEL RUNKLE, deceased,

Plaintiffs in Error

AGAINST

SANTIAGO J. BURNHAM, who sues for the use of FRANCISCO G. MEDIAVILLA,

Defendant in Error

Record, Case No. 14,291.

Term No. 266.

BRIEF FOR DEFENDANT IN ERROR.

Statement

This action was brought by Burnham, the plaintiff below, against Daniel Runkle, the intestate of the plaintiffs in error, upon an agreement executed at Havana on the 4th of August, 1884, (and of which a translation is given at page 35 of the Record).

Daniel Runkle himself was not present in Havana at the time of the execution of said agreement, but, as is expressly stated in the body of the same, it was assented to and subscribed on his behalf by José Manuel Mestre, who was both his lawyer and attorney-in-fact, representing him in Havana in the business transactions in and with reference to which the said agreement was made.

In point of fact, the purpose and function of said agreement were rather the formal recognition of Burn-

ham's *status*, as the real party in interest, and the *liquidation* of the amount payable to him (directly or indirectly) on account of transactions theretofore already had, than the original creation of Runkle's liability for the amount which should *prove* to be due, to *some* one by reason of those transactions.

It is, accordingly, in *the situation at the date of this agreement*, as created by the transactions which led up to and culminated in the execution of the paper which is thus nominally the basis of the action, that we must look for the real origin of Runkle's debt, as well as for the circumstances which clearly made the case one in which Mestre was fully authorized, by the power of attorney under which he acted, to execute on behalf of Runkle the agreement of August 4, 1884, recognizing Burnham as the real creditor, and the sum of $19,087.36 (with interest at nine per cent per annum from and after the date of such liquidation) as the amount in fact payable by said Runkle or his estate to said Burnham or his assignees by reason of the matters summed up in the settlement so arranged.

What, then, was the *status quo ante* the agreement of August 4, 1884?

Daniel Runkle (the original defendant below) had finally and completely failed to perform a contract awarded by the City of Havana, Cuba, to him, Runkle, (at first in conjunction with Gibson, Lyles, and Maddison & Co., his associates, whose interests and obligations he, Runkle, afterwards wholly acquired and assumed). By reason of this failure, Runkle had become liable to forfeit to the city a guarantee deposit of $64,000 which had been required as a condition to the awarding of said contract, and also to pay such additional damages as it should be held that the city had suffered by reason of his failure. It is true that the money so deposited had not been furnished by Runkle himself; but it had been furnished (through one Lino Martinez) for or on behalf of Runkle, at his request,

by parties to whom (through the said Martinez) he, Runkle, had expressly bound himself to *repay* the said sum of $64,000 (ON DEMAND, "if it should be demanded by the municipality" for failure to execute the contracts for the water works, &c.), and he, Runkle, had furthermore bound himself to pay, for the procuring and pledging of the said sum, "as a remuneration and for the payment of interest," a *further* "amount of $25,000 in Spanish gold," this latter sum being to be paid in monthly instalments "at the rate of $1\frac{137}{1000}$ per c't. from the amounts as they are paid for the works" (see agreement of March 27, 1882, RECORD, folios 51 and 52).

Having, by his failure to perform the contract with the city *subjected the guarantee deposit to forfeiture, and made impossible the specific performance* of the agreement to pay, "from the amounts as they (should be paid *for the works*," the $25,000 promised "as a remuneration and for the payment of interest," Runkle was beyond all question liable to be called upon to pay, *out of his own pocket, both the principal of the $64,000 deposited on his behalf, and the "interest" and "remuneration" payable for procuring it.*

Under these circumstances, he, Runkle, through Mestre, his lawyer and attorney-in-fact, negotiated to secure the intervention of Martinez to procure his release by the city from his liability under the contracts, *and the return 'intact' of the guarantee deposit of $64,000* (the non-confiscation of which would of course make good, so far, the parties advancing it, *without recourse to Runkle*).

Martinez, who, as was supposed, and as the event has proved, had the requisite influence with the city authorities, agreed to intervene, but made it, expressly, an absolute condition of his doing so, that Runkle should *formally recognize Burnham*, by whom the money had been advanced (to whom repayment had been attempted, by drafts on Maddison, which were

protested for non-payment), and to whom, through Martinez, it would ultimately have to be repaid, as the real creditor and party in interest; and, furthermore, that he, Runkle, should state and liquidate the amount so payable to said Burnham (over and above the $64,000 to be recovered from the city) as being the balance shown by the account rendered to Martinez by Burnham. (This balance, let us say in passing, was made up of interest and actual *expense* charges in the matter of the loan, and included *nothing* by way of "remuneration" for services; it amounted, on the day of the settlement, only to $19,087.36, being thus considerably less than the $25,000 which Runkle had expressly agreed to pay Martinez as interest and remuneration in the matter).

Not unnaturally—in view of the advantage to be thereby secured to Runkle—Martinez's "condition" was accepted, by and through the execution of the agreement of August 4, 1884 (which clearly embodies and expresses that acceptance, and binds Runkle to the fulfillment of the condition). Induced by this, Martinez most effectually intervened in behalf of Runkle, and actually procured his release from all liability under the contracts, and, furthermore, the return, intact, of the $64,000 which had been forfeited, and which Runkle was thus saved the necessity of making up out of his pocket to the parties who had advanced it. Thus, by inducing Martinez's intervention, by executing the agreement, Runkle in effect saved himself from all liability for damages to the city, and REDUCED *his liability on account of the guarantee deposit* from an amount considerably *in excess* of $64,000—to wit, $83,087.36 (interest and expenses having to be added to the principal sum) to the comparatively small *portion* of his real liability on this account, made up of the $19,087.36 shown by the statement of August 4, 1884, to be due for interest and expenses actually incurred.

Having thus secured such great advantages by entering into the agreement, Runkle afterwards refused to fulfill his portion of the bargain, and undertook to deny both the status of Burnham as creditor and the liquidation of the balance due by reason of the transactions as to the guarantee deposit.

POINTS.

I.

This Court in a very recent case has laid down the rule governing the review of a decision rendered by the Court after trial without a Jury, as follows:

> "This case having been tried by the Court "under the Statute, we can only inquire whether "the facts found in the special findings, con- "sidered in connection with the pleadings, are "sufficient to sustain the judgment, and whether "any error was committed upon rulings on "matters of law properly preserved by bill of "exceptions." (Fort Worth City Co. *v.* Smith Bridge Co., 15 Jan., 1894.)

Under this rule we conceive that the Court will find little difficulty in sustaining the judgment appealed from.

II.

None of the exceptions *to the admission or exclusion of evidence*, which are now insisted on on this appeal, really point out any such error as can be availed of here as a ground for reversal.

a. The only exceptions insisted on here, to rulings of the trial Court *on the admission or exclusion of evidence*, are the following four :

(i.) That found at page 16 of the Record (fol. 34).
(ii.) " " " 22 " " (top of page).
(iii.) " " " 23 " " (fol. 48).
(iv.) " " " 29 " " (fol. 61).

b. None of the four exceptions in question really point out any such error as can be availed of here as a ground for reversal.

(i.) Exception at folio 34, page 16 of Record.

This exception is based on two objections to the admission of the power of attorney made by Daniel Runkle to José M. Mestre under date of June 25, 1884.

The first objection was, "that it was not a complete instrument, in that it referred to an instrument in writing as annexed and made part of the power of attorney, which instrument was not annexed."

This is a purely technical objection.—The reference to the "instrument" in question is simply a recital of it as "a certain deed of transfer or assignment" under which (as well as under the contract with the city) Runkle *might* have a right to receive the money or property which the power authorized Mestre to collect on his behalf (if "due"). It was no more a necessary adjunct or "part" of the power of attorney, than was the original contract itself, which is also mentioned; and as a matter of fact the "instrument" in question *never was* actually "annexed and made part" of the power, the intention, in that respect, not having been carried out. The power as introduced was the power such as it had all along existed. Furthermore, every "part" or feature of the power of attorney, which was in the least degree *relevant*, or material to, the connection in which the paper was intro-

duced, *was contained* in the text actually presented. The *details* of the "assignment" which made Runkle the sole remaining contractor with the city, could in no way alter or affect the fact of his having authorized Mestre to arrange for his being released from his obligations as such contractor—*which fact*, ALONE, *the power was introduced to prove.*

The second of the two objections on which the exception in question was based, is this: "Because it (the power of attorney) *was not included in the bill of particulars of the plaintiffs' claim furnished to the defendant.*"

This objection is based upon Section 236 of the Practice Act of New Jersey (Revision of 1877, p. 885), which reads as follows:

"236. In any action on a record, or on a contract, express or implied, if the defendant shall, before plea filed, demand in writing a bill of particulars of the demand, or a copy of any note, bond, contract, deed, record or writing on which the declaration is founded, * * * it shall be the duty of the party, or his attorney, on whom such demand shall be made, to comply therewith within fifteen days, or in default thereof, besides the remedies now allowed, such defaulting parties shall, if it be the plaintiff, be debarred in such suit from all claim under such declaration, &c."

Our bill of particulars *did* duly give a copy of *the agreement of Aug. 4, 1884*, upon which we sue, and we submit that *that* is the only contract or writing "on which (in the sense of this statute) the declaration is founded." (See Additional Record, page 40.) The power of attorney is only an incidental piece of *evidence* on the issue raised by the defendant as to Mestre's *authority* to make Runkle a party to the agreement, but the agreement, and it alone, and completely, embodies and constitutes the cause of action which the declaration sets up.

The Supreme Court of New Jersey has held that under this statute "a party is not bound to furnish his adversary with a copy of any record or writing which is not the foundation of his suit or claim."

Maryott v. *Young*, 4 Vroom, 336.

(*ii.*) The exception appearing at the top of page 22 of the Record, was taken to the Court's admission of the account setting forth the items of the amount sued for, counsel having objected to that account "on the ground that it is not evidence against the defendant."

The account in question (the text of which appears on page 22 of the Record) *is the account expressly referred to in the agreement sued upon*, and simply shows the detailed items of that very "balance," of $19,087.36, which the agreement expressly binds Runkle to pay to Burnham directly, instead of indirectly, through Martinez.

The original was in the possession of defendant and produced by him on the trial on plaintiff's demand (See foot of p. 23, Addition to Record).

This being so, the paper is clearly a part of the statement of the claim based upon the agreement. Our claim being that Runkle expressly agreed to pay Burnham the balance *shown by this very account*, we had a right to introduce the account to identify the claim, and to show that the balance in question was not an arbitrary or fictitious one. If Runkle *did* agree to pay that balance, naming it, his reference to the account clearly makes it "evidence against" him; if he did not, the presence of the paper in question could not injure him in any way.

(*iii.*) The exception at top of page 23 of Record (folio 48) was based on the alleged "incompetency" of the question there appearing, which was addressed to Martinez after he had testified that "Mr. Mestre told (him), every step that he moved, that he was consulting with New York in everything."

The question objected to reads as follows :—" The question is, did you impose any condition upon giving your services to secure the rescission of that contract ? What did you require to be done on the part of Mr. Mestre for Mr. Runkle, in connection with this $19,000 ? What did you require that Mr. Mestre should do in order to get your influence with the city authorities ?"

We submit that the fact called for was perfectly " competent." Runkle's attempt to question Mestre's authority, under the power of attorney, to make on his behalf the agreement sued upon, made it a part of the issue in the case whether the making of the agreement was a necessary and proper thing to do in order " *to obtain (Runkle's) release from all liability as one of the contractors in connection with the loan and water works,*" this being the object which the power expressly authorized Mestre to accomplish by all proper means without which such end could not be obtained. Martinez was the man through whom Mestre, Runkle's agent, with Runkle's knowledge, was seeking to secure from the city the release of Runkle from liability. The fact, therefore, which this question called for and elicited—that Martinez had made it a *condition* of his intervention, that Mestre should on behalf of Runkle recognize Burnham as the real creditor on account of the guaranty deposit, and liquidate the balance due on that account—this fact, we say, was obviously relevant and material, as directly tending to prove that in complying with this condition, by the execution of the agreement of August 4, 1884, Mestre was fairly and properly carrying out the instructions of his principal —The evidence shows how ample was the *consideration* for Runkle's undertaking to pay Burnham.

(*cc.*) The exception on page 29 of the Record (folio 61) is based on the Court's *exclusion* of the five telegrams printed at pages 29 and 30 of the Record (Exhibits D 6, D 7, D 8, D 9).

We submit that the exclusion was proper, on the ground, as stated, that they had not been properly proved.

We submit, furthermore, that even if erroneous, the exclusion of these telegrams in no way injured the defendant. They are printed in full, and this learned Court can judge whether their introduction could by any possibility have made the case a better one for the defendant. They simply contained requests from Martinez and Mestre for the forwarding of powers "*confirming*" and "*amplifying*" the one of June 25, so as more *explicitly* and in detail to provide for the precise transactions contemplated. The mere *making* of these requests (which is all that the telegrams would have shown, if proved) *would hardly raise a presumption* that the requests had been *denied*, instead of *granted*; much less, that Mestre's authority had been, not only *not* "amplified," but actually restricted or qualified! If the fact had been that subsequent papers had really narrowed or diminished Mestre's authority to something *less* than that conferred upon him by the power of June 25, why did not Runkle or Olcott so testify? There is no proof whatever that later papers did in fact restrict the authority granted on June 25; there is no proof whatever that Martinez or Burnham was informed of any such restriction. We submit, accordly, that nothing which the telegrams could have proved, or tended to prove, would in the least have helped the defendant's case.

III.

The case presented by the Record is substantially this: Acting in pursuance of his employment for the purpose as the agent of Runkle, and in consideration of the release of his said principal from debts and liabilities of far greater amount, José M. Mestre did, for

and on behalf of Runkle, execute and enter into the agreement of August 4, 1884, upon which this suit is brought.

a. That in entering into the agreement of Aug. 4, 1884, for and on behalf of Runkle, Mestre was "*acting in pursuance of his employment for the purpose, as the agent of Runkle*," is very clearly shown by the evidence in the Record; which circumstance of course disposes of the appellant's exception (Record, p. 34, folio 69) to the *refusal of the Court to find* "that it does not appear that Mestre had any authority to assume an obligation on the part of the defendant."

In the first place, there is the power of attorney of June 25, 1884, admittedly executed by Runkle, and the sending of which to Mestre, with instructions, was sworn to by Olcott, Runkle's lawyer and witness (see folio 63, pages 30 and 31 of Record). This power expressly authorizes Mestre to act on behalf of Runkle "to obtain (his) release from all liability as one of the contractors in connection with the loan and water works," and also, to "receive such sum or sums of money" as might be payable to Runkle or for his account in the same matter—this latter provision evidently referring to the return by the city of the $64,000 guaranty deposit, as it was expressly stated by Runkle (fol. 26), and found by the Court that no other moneys were due Runkle (fol. 17).

By the *express terms* of the power of attorney in question (emphasized and shown to be entirely probable and natural by the admitted circumstance that Mestre, a partner of Olcott, was one of Runkle's lawyers, having charge in Havana of Runkle's interests in all the business in question) Mestre was authorized "to do *all things necessary* in (his) judgment" "to obtain his (Runkle's) release from all liability as one of the contractors in connection with the said loan and water works." By the testimony of Martinez (see folio 48, page 23 of

Record) it expressly appears that it was made an absolute condition to the procuring of Runkle's release from his liability as a contractor, that Mestre should on his behalf enter into the arrangement embodied in the agreement of August 4, 1884. Martinez being the one through whose influence the contracts had been obtained, and the release was hoped for—as it was in fact secured,—his making it a condition to his intervening, that the arrangement of August 4 should be assented to on behalf of Runkle, the compliance with this "condition" was clearly, within the meaning of the power of attorney, a "thing necessary in (Mestre's) judgment" "to obtain (Runkle's) release, etc."—Consequently, the making of the agreement on behalf of Runkle was precisely the sort of thing which the power expressly authorized Mestre to do on behalf of Runkle.

In view of all this (and of the case as a whole) it would have been simply absurd for the learned trial Judge to "find," as requested by the defendant, "that it does not appear that Mestre had any authority *to assume an obligation* on the part of the defendant." It would be mere quibbling to insist that Mestre was not doing something necessary to obtain Runkle's release from his liabilities under the contract, in agreeing to the settlement made, when by that settlement he "assumed an obligation" only to pay a *small balance* of an indebtedness already incurred for a much larger amount, and which, *but for that settlement* Runkle *would have been obliged to pay* IN FULL.

Runkle's letter to Mestre, of July 31, 1884 (see page 31 of Record), though it is not shown, and cannot be presumed, to have reached Mestre before the execution of the agreement—the time having hardly sufficed, even if we assume that the letter actually started as soon as written—conclusively shows that Runkle had been shown the text of the proposed agreement, and that he actually adopted it, though intimating a *wish*

that it might be made even more favorable for himself, by having the claim against him for the $19,087.36 made payable by him *only out of the proceeds of the Charnwood Railway stock* which Burnham had held as collateral and which, by the agreement of August 4, Runkle was to receive from Burnham as part of the settlement proposed. Burnham had received from Maddison & Co., Runkle's partners in the venture, the stock in question, (of the par value of about $70,000), as security for the repayment to him of the $64,000 advanced by him for the guarantee deposit; *as part of the settlement of August 4, recognizing him, Burnham, as the real creditor of Runkle, for the balance due on said account*, Burnham agreed to turn over to Runkle the shares of the stock in question.

This arrangement Runkle recognizes and accepts by his letter of July 31, for he therein orders Mestre to "observe the instructions of Mr. E. R. Olcott as to forwarding the stock to Messrs. Alexander & Co. of London, *for sale, remittance of the proceeds to New York*;" adding the suggestion: "Perhaps Mr. Burnham will be willing to take the stock and pay something in cash. Will he make an offer and of how much?" Now, inasmuch as it was only by virtue of the agreement of August 4, 1884, that Runkle was to have any interest in or ownership of the stock in question, his (Runkle's) assuming to give directions to Mestre as to its sale, clearly implied a ratification and acceptance of the proposed arrangement. *This* part of his letter is categorical, and definitive; his intimation that he "would *like it* to be stated" that Mr. Burnham would satisfy himself with what he should get from Martinez or the collateral stock, seems simply to have been born of a hope suggested by the large nominal value of that collateral. Neither the phrase nor the circumstances would suggest that it was intended as a disclaimer of a personal liability which unquestionably existed. Even had it been shown to have arrived in time, and

to have become, as against Burnham, a qualification of Mestre's authority—which is *not* the fact—this natural "desire" to be saved from even more of his liability for the default would hardly have been taken, under the circumstances, as a positive instruction to Mestre to refrain from saving him from much, unless allowed by Burnham and Martinez to save him from the *whole* of his liability!

b. That Mestre's execution of the agreement of Aug. 4, 1884, on behalf of Runkle, was "in consideration of the release of his said principal from debts and liabilities of far greater amount," is clearly shown by the evidence in the Record.

That which by the agreement in suit Runkle was bound to pay to Burnham (instead of to Martinez) was the sum of $19,087.36, which was only the *balance* left of the debt detailed in the statement printed at page 22 of the Record, after the allowance, upon that debt, of the $64,000 rescued from confiscation by Martinez in the interest of Runkle. There is no question that, but for this rescue of the guaranty deposit from the confiscation which had been incurred, Runkle would have been responsible to Burnham for the *entire* amount of such deposit ($64,000), Burnham having advanced the amount on behalf of Runkle (see Runkle's testimony, folio 27, page 13 of Record, and folio 29, page 14. Also Martinez' testimony, top of page 21).

Besides the *principal* of $64,000 which Runkle would thus have had to make up out of his pocket, had the city insisted upon the forfeiture which his default had incurred, Runkle would furthermore have been liable for interest and expenses in the matter of the procuring of the guarantee deposit. The agreement printed at top of page 25 shows that on this account Runkle had agreed to pay to Martinez "$25,000 in Spanish gold." (It is true that this was to be paid in instalments "from the amounts as they are paid for the

works," but as it was Runkle's own default that made that mode of payment impossible, he can hardly be allowed to set up the impossibility as a reason why the interest, renumeration for services, and reimbursement for expenses should not be deemed a liability of his).

A part of the liability in this connection consisted of the expenses incurred through the *abortive* attempt of the contractors to pay the $64,000 by means of drafts on London which were protested *for non-payment* (see account at page 22 of Record).

Still another liability which Runkle would have had to meet but for the release secured for him by the settlement embodied in the agreement sued upon, was his general liability to the city for damages for non-performance of the contract for a loan and water-works. The amount is unliquidated, but the importance of the sum involved is evident from the nature of the contract which Runkle failed to perform. And *both* the importance and the reality of the liability are shown by Runkle's execution of the power of attorney of June 25, for the express purpose of securing, by whatever means should be "necessary" for the purpose, his release therefrom.

c. That "José M. Mestre did, for and on behalf of Runkle, enter into the agreement of August 4, 1884, upon which this suit is brought," is very clearly shown by the evidence in the Record.

That Mestre did execute the agreement referred to is really not disputed, and is amply proved by the document itself, his signature upon which is admittedly genuine.

That he so executed it "for and on behalf of Runkle" expressly appears by the declaration in the paper itself (see folio 74, page 36 of the Record) that "Mr. José Manuel Mestre, as the attorney in fact of Mr. Runkle, subscribes the present stipulation in the name of his principal."

IV.

The case thus presented by the Record (see Point III.) fully justifies the decision of the learned Trial Judge, and the judgment based thereon and now under review, inasmuch as the agreement of August 4, 1884, bound Runkle to recognize Burnham, the plaintiff here, as his creditor for the balance of account which (with interest and costs), the judgment in question awards to Burnham.

This, if sustained, disposes of the appellant's sixth and last *Exception* (see Record, p. 34, folio 69), to the refusal of the Court to find "that the contract of August 4, 1884, does not impose any liability upon the defendant."

We submit that the learned trial Judge would have been guilty of an absurdity had he *not* "refused to find that the contract of August 4, 1884, does not impose any liability upon the defendant (Runkle)."

The question thus raised, be it noted, is no longer that of the authority of Mestre to give Runkle's assent to the agreement of August 4; the contention *here* is the surprising one that the *predication* (so to speak) embodied in that agreement is not to the effect that Runkle is to be bound to pay Burnham the balance of $19,087.36, but only to the effect that Runkle should have an option to take the Charnwood Forest stock!

As to this point, we ask the learned Court to read the text of the document in question *in the light of the circumstances under which the agreement came to be made*, and to notice, in this connection, the following particulars:

In the first place, the preamble or introductory clause of the agreement (see folio 67, foot of page 32 of Record), after reciting the receipt by Burnham of a *part* of his total claim (to wit, the $64,000 recovered intact from the city treasury), proceeds

to say that, "*in regard to the balance* of $19,087.36, that *still remains unpaid*," the agreement set forth in the rest of the paper, has been made. This at once points out, as the essential subject-matter of the agreement, *not* the giving to Runkle of an option to take stock, but the making of provision for "the balance" of Burnham's claim, which "still remained unpaid."

Burnham thereupon proceeds to promise to turn over to Runkle the stock which he (Burnham) has theretofore held as security for the claim, "*so soon as such balance* of $19,087.36 *shall be satisfied by the aforesaid Mr. Runkle, which* IS TO BE DONE *within the period of three months*, counting from the date hereof, it being left to his discretion *either to do so* DIRECTLY *or to direct that of the said shares deposited there be sold* (in accordance with such instructions as for such purpose he may give) such portion as may be necessary for the reimbursement of such balance of $19,087.36, which being covered, the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares. *The sum* OWING *shall carry* INTEREST *at nine per cent. per annum until its complete payment.*"

Surely, this language does not suggest an "option" as to the payment by Runkle, "which *is to be done* within the period of three months." What alone is "left to his discretion" is "either to do so (pay) *directly* or to direct" the sale of enough of the stock to satisfy the debt. Runkle was not a stranger to the debt, the balance of which was being provided for. He was himself the principal ultimately liable for the whole of it. On the other hand, no reason whatever is suggested for Burnham's having taken all this trouble simply to *give* to Runkle, *for nothing*, an "option" to take this stock by satisfying the balance due on the account under which the shares had been held as collateral. *Runkle had not furnished that*

collateral, and was in no way *entitled*, as owner thereof, to receive what surplus it might leave after paying the debt. Why should the agreement have been formally executed in triplicate, so that each of the parties should have his voucher against the other, if it was merely an option gratuitously vouchsafed to Mr. Runkle? Why should a formal power-of-attorney to Mr. Mestre have been required? Why should the paper have been submitted to Runkle before execution, if it was intended only to give him a privilege, exacting absolutely nothing in return? His own testimony proves that he knew nothing about this stock until he heard of it as being to be turned over to him upon his paying Burnham the balance due. That is to say, Burnham, the real creditor, in respect of the advancing of the guaranty deposit of $64,000, had in his hands as collateral the Charnwood stock in question. In the settlement embodied in the agreement of August 4, 1884, he, Burnham, is to be formally recognized as such real creditor upon this account, by Runkle, the real debtor; Martinez, the intermediary who has heretofore *appeared* as the debtor of Burnham and the creditor of Runkle, having made it a condition of his intervening to secure Runkle's release from other liabilities, that, as to the balance due on this account of Burnham's, Runkle should expressly and formally recognize the debt as his, and become *directly* liable to Burnham (instead of *indirectly*, through Martinez himself). Runkle being thus to assume a direct liability to Burnham for the balance due on the deposit account, and Burnham having the stock in his hands as security for his claim, the settlement naturally provides for Runkle's receiving the collateral when he satisfies the debt, he, Runkle, being the assignee (as the paper itself recites) of Maddison & Company, the original co-contractors by whom the collateral was furnished. Note, too, that the assign-

ment to Zabarte includes "all the rights and rights of action that belong to him under the foregoing agreement" (see folio 74, page 37).

Surely, the only construction of the agreement which is coherent and intelligible in the light of all the facts, is that which the learned trial Judge summed up in his conclusion that "In making the agreement of August 4, Runkle only *exchanged creditors*. Martinez was indebted to Burnham in the sum of $19,087.36, and Runkle was indebted to Martinez for a like amount. By the agreement Runkle assumed the payment of this sum to Burnham in the manner set out in the agreement."

IV.

The judgment appealed from should be affirmed, with costs.

Feb. 19, 1894.

BABBITT & LAWRENCE,
Attorneys for Defendant in Error.

FREDERIC R. COUDERT,
ROBERT O. BABBITT,
CHARLES FREDERIC ADAMS,
Of Counsel.